APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6397

JERMAINE ANTWAN TART,

Plaintiff - Appellant,

v.

JAMESE VIGUS; MARK TROCK,

Defendants - Appellees,

and

JOHN DOES; TABOR CITY MAILROOM STAFF,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:17-ct-03207-D)

Submitted: August 21, 2020 Decided: September 2, 2020

Before WILKINSON, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jermaine Antwan Tart, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Jermaine Antwan Tart appeals the district court's orders denying relief on his 42 U.S.C. § 1983 complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Tart v. Vigus*, No. 5:17-ct-03207-D (E.D.N.C. May 29, 2018, & Mar. 2, 2020). We grant Tart's motion to supplement his informal brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: September 2, 2020

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(5:17-ct-03207-D)

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J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:17-CT-3207-D

JERMAINE ANTWAN TART,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
JAMESE VIGUS[1] and	)	
MARK TROCK,	)	
	)	
Defendants.	)	

On August 30, 2017, Jermaine Antwan Tart ("Tart" or "plaintiff"), a state inmate proceeding pro se and in forma pauperis, filed a complaint under 42 U.S.C. § 1983. See [D.E. 1, 2, 7]. On May 29, 2018, the court reviewed Tart's filings under 28 U.S.C. § 1915A, dismissed all claims and defendants other than Tart's claim for retaliation, and directed Tart to amend his complaint [D.E. 19]. Tart filed an amended complaint in response to the court's order [D.E. 23], along with a motion to amend [D.E. 21] and numerous other motions [D.E. 20, 22, 24–27]. On August 31, 2018, the court reviewed Tart's amended complaint, granted Tart's motion to amend but dismissed the claim in that motion, allowed Tart to proceed with his claim for retaliation against defendant Jamese Vigus, and appointed North Carolina Prisoner Legal Services ("NCPLS") to assist Tart with conducting discovery [D.E. 31]. On October 22, 2018, the court granted in part Tart's motion for reconsideration and allowed him to proceed with an additional claim for violation of due process in connection with disciplinary proceedings against Vigus and another defendant, Mark Trock [D.E. 41].

[1] When Tart filed the action, this defendant's name was Jamese Smith. Her name is now Jamese Vigus. See Text Order [D.E. 77].

On October 30, 2018, defendants waived service [D.E. 43]. On December 27, 2018, defendants answered the complaint [D.E. 53]. The discovery period has concluded, and the parties have filed cross motions for summary judgment [D.E. 87, 94].[2] As explained below, the court grants defendants' motion for summary judgment and denies plaintiff's motions.[3]

I.

On August 30, 2017, Tart commenced this action, naming as defendants "John Doe Defendants" and "Tabor City Mailroom Staff[,]" alleging that Tabor Correctional Institution ("Tabor") mailroom staff interfered with his mail in violation of his First Amendment rights. See Compl. [D.E. 1] 1, 5–7; May 29, 2018 Order [D.E. 19] 2. On September 22, 2017, defendant Vigus, a correctional unit housing manager at Tabor entered Tart's housing pod and spoke with Tart. See Vigus Aff. [D.E. 91-1] ¶¶ 3,6; Trock Aff. Ex. A [D.E. 91-5] 2 (statement by Tart); [D.E. 96] 11 (interrogatory responses). The parties disagree about the content of that conversation. Following the conversation, the parties agree that Vigus ordered Tart to lock down in his cell. See Vigus Aff. ¶¶ 7–9; Trock Aff. Ex. A [D.E. 91-5] 2, 4. When Tart refused to comply with Vigus's order to lock down, she placed him in segregation and reported the interaction to a Tabor captain who initiated a disciplinary proceeding against Tart. See [D.E. 21] 2; Am. Compl. [D.E. 23] 5; Vigus Aff. ¶¶ 10–12; Trock Aff. [D.E. 91-4] ¶ 7; Trock Aff. Ex. A [D.E. 91-5] 2, 9–10; [D.E. 96] 8 (housing

[2] Tart captioned his motion as one for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). See [D.E. 94]. Tart, however, filed and relies on materials outside the pleadings, including discovery responses. See [D.E. 96] 10–13; [D.E. 96-1] 1–6. Thus, the court construes the motion as one requesting summary judgment. See Fed. R. Civ. P. 12(d); Gay v. Wall, 761 F.2d 175, 177 (4th Cir. 1985); Williams v. Crosby, No. 5:12-CT-3056-F, 2013 WL 791253, at *2 (E.D.N.C. Mar. 4, 2013) (unpublished).

[3] Tart has also filed a motion for an "emergency injunction" based on his inability to access his "legal property relevant to the 19 civil suits in state and federal court and also his MAR which has been delayed for 7 months." [D.E. 99] 1. The motion lacks merit and is denied.

assignment history).

A Tabor officer who is not a defendant investigated Vigus's report. See Trock Aff. Ex. A [D.E. 91-5] 9–10 (investigating officer's report); [D.E. 95-1] 5–6. The investigating officer provided Tart with notice of the charges against him and an opportunity to write a statement, which he did. See Trock Aff., Ex. A [D.E. 91-5] 7, 9–10; ; Pl.'s Ex. 2 [D.E. 95-1] 6. Vigus also "provided a written statement" to the investigating officer. Vigus Aff. ¶ 13. As part of the investigation, Tart requested both witness statements and live statements from "'whomever the inmates were near the slider at the time of incident immediately after unlock as soon as Ms. [Vigus] walked in the pod[.]'" Trock Aff. Ex. A [D.E. 91-5] 9; Pl.'s Ex. 2 [D.E. 95-1] 6. Defendant Trock, another correctional unit housing manager at Tabor, reviewed the camera footage and could not identify the other inmates who were present at the time. See Trock Aff. Ex. A [D.E. 91-5] 10; [D.E. 95-1] 6. Thus, the investigating officer did not collect any further witness statements. See Trock Aff. Ex. A [D.E. 91-5] 10; [D.E. 95-1] 6. Tart "was not allowed to view the tape to help [i]dentify the inmates." Trock Aff. Ex. A [D.E. 91-5] 2; see Am. Compl. [D.E. 23] 5.

On October 2, 2017, the disciplinary hearing officer who is not a defendant conducted a hearing. Trock Aff. Ex. A [D.E. 91-5] 6. The disciplinary hearing officer reviewed the written statements by Tart and Vigus. See id. Vigus "did not participate in the disciplinary hearing and had no role in assessing any disciplinary sanctions." Vigus Aff. ¶ 14; see [D.E. 96] 10. "During the hearing, [Tart] stated that h[e] will add these charges to the lawsuit he has pending." Trock Aff. Ex. A [D.E. 91-5] 6. The disciplinary hearing officer found Tart guilty of the two offenses as charged, sanctioned Tart with the loss of canteen, telephone, and visitation privileges for 30 days, and provided Tart with "a copy of the record of hearing, punishment and appeal form." Id. at 4, 6. Tart remained in segregation for two more days even though it was not a disciplinary sanction that the

disciplinary hearing officer ordered. See [D.E. 96] 8. Tart appealed, and wrote a statement indicating that the disciplinary charges were "fake meaning totally made up . . . [and in] retaliation for me telling Ms. [Vigus] that I would add as many staff as necessary to a pending lawsuit which I started on Tabor City[.]" Trock Aff. Ex. A [D.E. 91-5] 2–3. On November 2, 2017, the Chief Disciplinary Officer for the North Carolina Department of Public Safety upheld Tart's disciplinary conviction. See id. at 1.

On November 15, 2017, Tart moved to amend his complaint "to add retaliation claim, for false write ups, stolen mail, magazines, reading of legal mail outside my presence, stolen toothpaste, stolen postage stamps and placement in 21 hr lockdown for 90 days due to the fake write up." [D.E. 10] 1. Tart did not name any proposed defendant in this motion. On April 10, 2018, Tart named Vigus and Trock as defendants for the first time when he alleged their involvement in "the illegal theft and depositing and spending of several checks sent to this prison in the amount of $10 million plus per check." [D.E. 16] 1. On June 27, 2018, Tart filed an amended complaint which included his remaining claims for retaliation against Vigus and violation of due process against Trock. See Am. Compl. at 5–9; Oct. 22, 2018 Order [D.E. 41] 1–2.

II.

Summary judgment is appropriate when, after reviewing the record as a whole, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248–49, but "must come forward

with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (emphasis and quotation omitted). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. See Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. See Scott v. Harris, 550 U.S. 372, 378 (2007). "When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." Desmond v. PNGI Charles Town Gaming, L.L.C., 630 F.3d 351, 354 (4th Cir. 2011).

A.

Tart contends that Vigus and Trock retaliated against him by initiating a disciplinary proceeding against him after he exercised his First Amendment rights. "The First Amendment grants the rights to free speech and to seek redress of grievances. These rights, to a limited extent, exist in a prison setting." Gullet v. Wilt, 869 F.2d 593, 1989 WL 14614, at *2 (4th Cir. 1989) (per curiam) (unpublished table decision). In order to prevail on this claim, Tart must produce sufficient evidence that "(1) he engaged in protected First Amendment activity, (2) the defendant took some action that adversely affected his First Amendment rights, and (3) there was a causal relationship between his protected activity and the defendant's conduct." Martin v. Duffy, 858 F.3d 239, 249 (4th Cir. 2017) (quotation and alterations omitted); see Booker v. S.C. Dep't of Corr., 855 F.3d 533, 540, 544 (4th Cir. 2017); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 499 (4th Cir. 2005).

To demonstrate a causal connection, "[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must . . . . be a 'but-for' cause,

meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019); see Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994). A plaintiff may point to circumstantial evidence indicating that the defendant was aware of the First Amendment activity and that the retaliation occurred within "some degree of temporal proximity" to that activity. Constantine, 411 F.3d at 501. However, "an inmate cannot immunize himself from adverse administrative action by prison officials merely by filing a grievance or a lawsuit and then claiming that everything that happens to him is retaliatory[.]" Maben v. Thelen, 887 F.3d 252, 264 (6th Cir. 2018) (quotation and citation omitted), reh'g denied (Apr. 19, 2018); see Harris v. Elam, No. 7:17-CV-00147, 2019 WL 691791, at *4–6 (W.D. Va. Feb. 19, 2019) (unpublished).

Even viewing the record in the light most favorable to Tart, no rational factfinder could find that Vigus initiated disciplinary proceedings against Tart because of a lawsuit he had filed, where there is no competent evidence that Vigus was aware of the lawsuit and the lawsuit did not name her as a defendant or bear any relationship to her. See Keeling v. Barrager, 666 F. App'x 153, 156–57 (3d Cir. 2016) (per curiam) (unpublished); Wood v. Yordy, 753 F.3d 899, 904–05 (9th Cir. 2014); Clark v. Beeman, No. TDC-18-0090, 2019 WL 4228400, at *12 (D. Md. Sept. 4, 2019) (unpublished); Williams v. Womble, No. 2:15-CV-728-ECM-SMD, 2019 WL 1996692, at *11 (M.D. Ala. Apr. 5) (unpublished), report and recommendation adopted, 2019 WL 1992125 (M.D. Ala. May 6, 2019) (unpublished); Quiroz v. Horel, 85 F. Supp. 3d 1115, 1126 (N.D. Cal. 2015); see also Harris, 2019 WL 691791, at *6; Thompson v. Clarke, No. 7:17-CV-00010, 2018 WL 1955423, at *5 (W.D. Va. Apr. 25, 2018) (unpublished); cf. Martin, 858 F.3d at 250.[4] Moreover, Trock's

[4] To the extent Tart alleges that Vigus "wrote me up with three fake disciplinary charges on 9/22/17 after I repeatedly told her if she doesn't get her staff in line I will sue them all[,]" [D.E. 21]

participation in the disciplinary proceedings is insufficient as a matter of law to constitute retaliation in violation of the First Amendment. See Roscoe v. Kiser, No. 7:18-CV-00319, 2019 WL 6270240, at *8 (W.D. Va. Nov. 22, 2019) (unpublished); cf. Nieves, 139 S. Ct. at 1728. Thus, the court grants defendants' motion for summary judgment and denies plaintiff's motion for summary judgment as to plaintiff's First Amendment claims.

B.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "To state a procedural due process violation, a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." Prieto v. Clarke, 780 F.3d 245, 248 (4th Cir. 2015). Liberty interests that the Due Process Clause protects "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995); see Prieto, 780 F.3d at 249.

The sanctions of the disciplinary hearing officer did not deprive Tart of any protected liberty or property interest. See Sandin, 515 U.S. at 486; Mutschler v. Tritt, 685 F. App'x 167, 170 (3d Cir. 2017) (per curiam) (unpublished); Jordan v. Wiley, 477 F. App'x 525, 529 (10th Cir. 2012) (unpublished); Mosley v. Borders, No. 2:13-CV-549-MHT, 2016 WL 2765071, at *5–7 (M.D. Ala. Apr. 15, 2016) (unpublished) (collecting cases), report and recommendation adopted, 2016 WL

2, the First Amendment does not protect "threatening to file a lawsuit during a confrontation with" prison staff. Hanna v. Maxwell, 415 F. App'x 533, 536 (5th Cir. 2011) (per curiam) (unpublished); see Jones v. Book, 404 F. App'x 169, 170 (9th Cir. 2010) (unpublished); Gidarisingh v. Bittelman, No. 12-CV-916-WMC, 2015 WL 4742576, at *2 (W.D. Wis. Aug. 11, 2015) (unpublished); Wilson-El v. Majors, No. 1:12-CV-638-TWP-DML, 2014 WL 4594436, at *9 (S.D. Ind. Sept. 15, 2014) (unpublished).

2640524 (M.D. Ala. May 9, 2016) (unpublished); Hood v. Steinour, No. 5:11-CT-3018-FL, 2012 WL 3629198, at *2–3 (E.D.N.C. Aug. 22, 2012) (unpublished) (collecting cases); Hines v. Jones, No. CIV-07-1429-R, 2009 WL 3448222, at *6 (W.D. Okla. Oct. 21, 2009) (unpublished), aff'd, 373 F. App'x 890 (10th Cir. 2010) (unpublished); cf. Lennear v. Wilson, 937 F.3d 257, 273–74 (4th Cir. 2019).[5] Alternatively, this claim fails in light of the court's ruling on Tart's retaliation claim. Cf. Smith v. Mensinger, 293 F.3d 641, 653 (3d Cir. 2002); Mosley, 2016 WL 2765071, at *9; Hines, 2009 WL 3448222, at *12. Thus, the court grants defendants' motion for summary judgment and denies plaintiff's motion for summary judgment as to plaintiff's due process claims.

III.

In sum, the court GRANTS defendants' motion for summary judgment [D.E. 87] and DENIES plaintiff's motions for summary judgment and an emergency injunction [D.E. 94, 99]. The clerk shall close the case.

SO ORDERED. This 28 day of February 2020.

JAMES C. DEVER III
United States District Judge

[5] To the extent Tart focuses on perceived policy violations in his assignment to modified housing, see Pl. Mot. Mot. Summ. J. [D.E. 94] 4–5 & Ex. 1 [D.E. 95-1] 1–3, a prisoner has no protected liberty interest in a specific custody classification, a transfer, a non-transfer, or in work release. See, e.g., Wilkinson v. Austin, 545 U.S. 209, 221–22 (2005); O'Bar v. Pinion, 953 F.2d 74, 83–84 (4th Cir. 1991); Paylor v. Lewis, No. 5:12-CT-3103-FL, 2016 WL 1092612, at *12 (E.D.N.C. Mar. 21, 2016) (unpublished). Moreover, a violation of a prison policy that does not result in a constitutional violation does not give rise to a claim under section 1983. See, e.g., Danser v. Stansberry, 772 F.3d 340, 346–49 (4th Cir. 2014); see also Jackson v. Sampson, 536 F. App'x 356, 357 (4th Cir. 2013) (per curiam) (unpublished).