APPENDIX "A"

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6518

CASEY RAFAEL TYLER,

Plaintiff - Appellant,

v.

KATY POOLE; LACHELLE BULLARD,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. William L. Osteen, Jr., District Judge. (1:17-cv-01104-WO-JLW)

Submitted: October 20, 2020 Decided: October 23, 2020

Before GREGORY, Chief Judge, DIAZ, Circuit Judge, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Casey Rafael Tyler, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX "A"

PER CURIAM:

Casey Rafael Tyler appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on Tyler's 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. *Tyler v. Poole*, No. 1:17-cv-01104-WO-JLW (M.D.N.C. Mar. 31, 2020). 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

APPENDIX
"B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CASEY RAFEAL TYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17CV1104
	)	
KATY POOLE and	)	
LACHELLE BULLARD,	)	
	)	
Defendants.	)	

ORDER

This matter is before this court for review of the Memorandum Opinion and Recommendation ("Recommendation") filed on November 25, 2019, by the Magistrate Judge in accordance with 28 U.S.C. § 636(b). (Doc. 35.) In the Recommendation, the Magistrate Judge recommends that Defendants' motion for summary judgment, (Doc. 30), be granted and that this action be dismissed. The Recommendation was served on the parties to this action on November 25, 2019. (Doc. 36.) Plaintiff filed objections, (Doc. 37), within the time limit prescribed by Section 636.

This court is required to "make a de novo determination of those portions of the [Magistrate Judge's] report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). This court "may accept, reject, or

modify, in whole or in part, the findings or recommendations made by the [M]agistrate [J]udge . . . or recommit the matter to the [M]agistrate [J]udge with instructions." Id.

Though the court has reviewed the Magistrate Judge's report de novo and has determined all of Plaintiff's objections are immaterial or without merit, it addresses several of these objections here.

First,[1] Plaintiff argues that he alleged a First Amendment freedom of assembly claim against Defendant Poole which the Magistrate Judge did not address. (Pl.'s Objections to Magistrate Judge's Recommendation ("Pl.'s Objs.") (Doc. 37) ¶ 2.) Plaintiff does not, however, explain in his objections how an associational right, as specifically addressed by the Magistrate Judge, (Recommendation (Doc. 35) at 11-12),[2] and an assembly right might be different, or more specifically,

[1] Plaintiff's first objection is actually that he has been prejudiced in not having counsel appointed. (Pl.'s Objections to Magistrate Judge's Recommendation (Doc. 37) ¶ 1.) This court addressed that argument in a previous order. (Doc. 15.) Plaintiff has not presented new evidence or argument that alters that analysis.

[2] All citations in this Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

different on the facts of this case.[3] Instead, Plaintiff merely restates his complaint of Defendant Poole "forcing me too close to people I don't want to associate with while I'm eating." (Pl.'s Objs. (Doc. 37) ¶ 2.) The Magistrate Judge clearly addressed Plaintiff's claim of his associational right relating

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[3] Plaintiff is partially correct about a difference between freedom of assembly and freedom of association. "[F]reedom of assembly, includes of course freedom of association . . . ." Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (Black, J., concurring). As explained by the Court in a later case,

> "Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion."

City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (quoting Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984)). The difference between the two, however, does not help Plaintiff here. Plaintiff has only raised what can be construed as an association claim (in that he is being forced to associate), (see Complaint (Doc. 2) at 12), a claim the Magistrate Judge adequately addressed. Plaintiff's Complaint, even when construed liberally, never alleges that he was denied the right to "to meet peaceably [with others] for consultation in respect to public affairs and to petition for a redress of grievances." De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

to dining. (Recommendation (Doc. 35) at 10-12.) This is not an inconsequential failure on the part of Plaintiff as a court "must accord substantial deference to the professional judgment of prison administrators" and "[t]he burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." Overton v. Bazzetta, 539 U.S. 126, 132 (2003). "[F]reedom of association is among the rights least compatible with incarceration." Id. at 131 (citing Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977); Hewitt v. Helms, 459 U.S. 460 (1983)). "Some curtailment of that freedom must be expected in the prison context." Id.

As the Fourth Circuit has recognized, "[n]othing could be more routine in prison administration than determining dining hours and practices." Childs v. Pegelow, 321 F.2d 487, 490 (4th Cir. 1963). In Childs, the Fourth Circuit explained:

> It is clear from the original petitions that plaintiffs sought merely to have the court enforce an agreement by which defendant Pegelow was alleged to have orally promised to daily provide Muslim inmates of Lorton with a full course pork-free meal after sundown during the month of December 1962. Such arrangements are clearly matters of internal prison administration, no doubt bringing into play many varied considerations, and do not rise to the level of constitutional rights involving due process of law and equal protection of the laws such as those recognized and protected in the few cases where courts have carved out exceptions to the accepted rule of noninterference with prison administration. There is no charge here of discrimination against the plaintiffs by way of interference with the practice of

> their religious beliefs as in Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961). Nothing could be more routine in prison administration than determining dining hours and practices. The plaintiffs are, in fact, seeking special privileges because of their religious beliefs, privileges not extended to the other inmates. It is readily foreseen that, in considering plaintiffs' request for a late supper hour, many complicated problems might be presented involving the services of kitchen supervisors, cooks, dish washers, attendants, their hours of work and their periods of relaxation and rest. It has been pointed out repeatedly that prisoners suffer a limitation of many privileges and rights, Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948), even a limitation of the right to bring civil actions. See Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955), and reference therein to the recognition of the fact that, under the laws of many states, imprisonment destroys the legal capacity of penitentiary inmates to sue. We find no basis in the present cases for making an exception to the general rule that courts will not interfere with routine matters of prison administration. We, therefore, hold that no justiciable issue was presented by the petitions and there was no duty devolving upon the District Court to [c]onduct a hearing or consider the merits of the charges.

Childs, 321 F.2d at 490.[4]

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[4] Plaintiff also claims he was "accosted" for eating too slowly. (Doc. 23 at 1.) Plaintiff now claims that the allegation is uncontested and therefore admitted. (Pl.'s Objs. (Doc. 37) ¶ 13.) Despite Plaintiff's contention, Defendants denied that allegation. (Doc. 29 at 2.)

It is possible Plaintiff is alleging that he exceeded the fifteen minutes allotted by prison policy for inmates to finish their meals. (See Defs.' Br. (Doc. 31) Attach. 1, Affidavit of Katy E. Poole ("Poole Aff.") (Doc. 31-1) at 11.) This is not an unreasonable policy. See Childs, 321 F.2d at 490. Even if Plaintiff's allegation is uncontested, it does not rise to the level of a constitutional violation. Plaintiff does not allege

(Footnote continued)

Plaintiff's allegations fail to explain why the dining hall rules, applicable to all inmates, constitute an infringement of a constitutional right. As the Magistrate Judge found, "there do not appear to be any decisions holding that a prisoner has the right not to dine with other individuals, even if doing so is prohibited by the prisoner's religion." (Recommendation (Doc. 35) at 11.)

Nevertheless, as found by the Magistrate Judge, the court concludes Defendant Poole at a minimum has qualified immunity because the right of prisoners to associate (or not associate) in the dining hall has not been clearly established such that "every reasonable official would have understood that what [she] is doing violates that right." Reichle v. Howards, 566 U.S. 658, 664 (2012) (internal quotation marks and alterations omitted). Plaintiff's objections to the Magistrate Judge's association analysis set forth in the Recommendation are overruled.

Plaintiff also objects to several factual findings by the Magistrate Judge relevant to Plaintiff's claim of retaliation.

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that he was physically accosted or assaulted in any way. In fact, Plaintiff has not come forward with any evidence at all on this allegation. Plaintiff cites generally to his affidavit, but that document does not contain any information regarding an alleged accosting for not eating fast enough. He does aver that he has dental problems, but not that he was accosted for chewing too slow as a result. (See Doc. 34 at 3-4.)

The Magistrate Judge found that the allegations that Defendant Poole's actions alleged as retaliation "are conclusory," (Recommendation (Doc. 35) at 15), and that the record does not "indicate that Defendant Poole was involved in the decision to drug-test Plaintiff or bring the subsequent charges against him when he refused to provide a urine sample." (Id.) Plaintiff objects to those findings, (Pl.'s Objs. (Doc. 37) ¶¶ 4-6), as well as alleging that the Recommendation failed to recognize his placement in regular population as retaliation, (id. ¶¶ 8-11).

Plaintiff's objection to the facts found by the Magistrate Judge is without merit. First, Plaintiff argues that Defendant Poole, as the "Facility Head," was aware of the dental issues and complaints by Plaintiff as to his disciplinary action and assignment to regular population. (Id. ¶ 6.) Plaintiff cites a variety of sources to support his argument, primarily relying upon the regulations that outline the role of the Facility Head in the disciplinary process. (Id.) In fact, the Magistrate Judge did not find, nor did Defendant Poole state, that Defendant Poole "had zero to do with [Plaintiff] being drug tested or the charges that [Plaintiff] faced in Jan-Feb 2018." (Id.) Instead, the Magistrate Judge found that "the record demonstrates that Defendant Poole did not participate in Plaintiff's disciplinary hearing for the B-25 infraction," (Recommendation (Doc. 35) at

15), and that Defendant Poole was not involved "in the decision to drug-test Plaintiff or bring the subsequent charges against him when he refused to provide a urine sample." (Id.) Even assuming, as Plaintiff argues, that Defendant Poole was aware, as "Facility Head," of the fact of these charges, the record clearly indicates Defendant Poole did not participate in the disciplinary hearing nor is there any evidence that Defendant Poole ordered the drug testing.

The evidence with respect to the disciplinary prosecution is not disputed except as to Plaintiff's allegations as to Defendant Poole's knowledge. According to the affidavits of Defendant Poole and Defendant Bullard, "Sgt Miles informed inmate Casey Tyler . . . to pack up because he is getting released to regular population. Inmat [sic] refused to pack up to go back to regular population. Offender is charged with a B25." (Defs.' Brief in Supp. of Mot. for Summ. Judgment ("Defs.' Br.") (Doc. 31) Attach 2, Affidavit of Lachelle Bullard ("Bullard Aff.") (Doc. 31-2) at 39.) Apparently the incident was investigated by Justin Chavis after the initial report from Sgt. Miles. (Id. at 41.) The Disciplinary Hearing Officer found Plaintiff guilty of the B25 offense "based on the reporting party's statement and the investigating officer's report." (Id. at 39.) "Plaintiff appealed the guilty determination per NCDPS

policy to the Director of Prisons. Plaintiff's Disciplinary File was reviewed by Monica Bond . . . . On 26 March 2018 the punishment for the B-25 infraction was upheld on appeal . . . ." (Bullard Aff. (Doc. 31) ¶ 14.)

This court agrees with the findings of the Magistrate Judge, that Plaintiff's allegations that Defendant Poole "took action that adversely affected that right are conclusory," and that "Defendant Poole did not participate in Plaintiff's disciplinary hearing for the B-25 infraction . . . ." (Recommendation (Doc. 35) at 15.)

Further, Plaintiff does not dispute the central fact that he refused to return to regular population when ordered to do so. In summary, his argument is that Defendant Poole "had no choice but to read all of this data in order to 'determine' what to do about my refusal to return to rp (regular population). She chose to prosecute me. That's deliberate indifference manifest." (Pl.'s Objs. (Doc. 37) ¶ 6.) Because Plaintiff does not dispute the fact that he did fail to follow an order and thereby violate the regulations, any knowledge Defendant Poole may have had as facility head is not sufficient to establish retaliation. Even if Defendant Poole made a conscious decision to allow the disciplinary action to proceed, Plaintiff's misconduct vitiates

any inference that might be drawn from Defendant Poole's decision.

Similarly, with respect to the drug test, the Magistrate Judge concluded that the record does not "indicate that Defendant Poole was involved in the decision to drug-test Plaintiff or bring the subsequent charges against him when he refused to provide a urine sample." (Recommendation (Doc. 35) at 15.) The undisputed facts set forth in Defendant Poole's affidavit and the attachments establish which individuals were involved in the drug testing and disciplinary processes. (See Poole Aff. (Doc. 31-1) at 98-121.) Plaintiff has presented no evidence that Defendant Poole had any involvement in the drug test incident, and his unsupported speculation is insufficient to establish that Defendant Poole had any involvement in the process. Defendant has not presented any evidence that the incident arose as a result of an effort by Defendant Poole to retaliate against Plaintiff for filing a complaint.

Plaintiff further alleges the Magistrate Judge failed to consider his removal from protected population to regular population as an act of retaliation. (Pl.'s Objs. (Doc. 37) ¶¶ 8-11.) With respect to his request to be placed in protective custody, Plaintiff alleges in his affidavit that he witnessed a fight in the dining hall in 2017, (Doc. 34 at 1), that he had to

sit with his back to the serving line, (id. at 2), that he knew of another inmate hit by a gang in the dining hall, (id.), and that he has to sit at tables with individuals he was not able to identify for fear of retaliation, (id.). Nevertheless, Plaintiff's request for protective custody, dated January 1, 2018, is not disputed and states the following:

> I seek protective custody for fear of physical confrontation with dining hall staff who will not let me eat my meals in peace. I sued Katy Poole recently over this issue, actually in December 2017, & the federal court is looking into it. I have missed many meals trying to avoid dining hall staff & I can't keep that up. Plus, I cannot continue to put up with their hostility peaceably. To avoid an assault on myself, or retaliation for my lawsuit, I want protective custody, & so I can eat in peace.

(Bullard Aff. (Doc. 31-2) at 60.)

The investigator, Sergeant Willie Davis, filed a report and concluded that "inmate Tyler did not provide enough information in his statement. Due to lack of evidence provided by inmate Tyler, his request is denied." (Id. at 59.) Sergeant Davis's report is dated January 22, 2018. (Id.) Plaintiff was then ordered to exit restrictive housing on January 23, 2018, and return to regular population. (Bullard Aff. (Doc. 31) ¶ 12.)

Although Plaintiff alleges retaliatory intent as to Defendant Poole, Plaintiff does not dispute the objective facts described above. This court is unable to determine that the decision by Sergeant Davis that Plaintiff did not provide enough

information, is improper, much less that the decision was an act of retaliation on the part of Defendant Poole. Possible hostility from dining hall staff falls far short of demonstrating a physical threat to Plaintiff. Any error on the part of the Magistrate Judge to specifically address this particular issue, the return of Plaintiff to the regular population as retaliation, is harmless.[5]

Plaintiff objects to the Magistrate Judge's analysis regarding his dental health Eighth Amendment claims against both Defendants. (Pl.'s Objs. (Doc. 37) ¶¶ 6, 14.) Specifically, Plaintiff's argument posits that Defendants did in fact know about his dental health problems prior to the filing of his instant lawsuit. (Id.) Plaintiff points out that his dental complaints are included in one of the investigative reports, one of which is dated January 24, 2018, in which he claims to have "sensitive and weak teeth." (Id. ¶ 14; Bullard Aff. (Doc. 31-2) at 41, 53.) The court initially notes that, as to Defendant Bullard, Plaintiff's argument is immaterial as her duties did

[5] Plaintiff objects to the Magistrate Judge's failure to address his "harassment" claim. (Pl.'s Objs. (Doc. 37) ¶ 3.) Plaintiff claims Defendant Poole's dining hall policies about seating were "harassment for harassment's sake . . . ." (Id.) Plaintiff has not come forward with any evidence to support the allegation that Defendant Poole implemented the policy to merely harass inmates, and "courts will not interfere with routine matters of prison administration," Childs, 321 F.2d at 490, especially when faced with bare accusations.

not include the provision of medical services. (Bullard Aff. (Doc. 31-2) ¶¶ 3-6.)

With regard to Defendant Poole, Plaintiff alleges, (Complaint (Doc. 2) at 2), and Defendant Poole confirms, that she is "the Correctional Facility Administrator at Scotland Correctional Institution," (Poole Aff. (Doc. 31-1) ¶ 3). Poole's affidavit also states that she is "not a healthcare provider." (Id. ¶ 11.) However, she does note that "the facility head is responsible for providing 'an environment that ensures the appropriate delivery of health services.'" (Id.) Neither party satisfactorily explains whether the "Correctional Facility Administrator" is the "facility head" within the meaning of the regulations. Nevertheless, assuming that Defendant Poole is the facility head and responsible for the appropriate delivery of health services, the record fails to establish deliberate indiffence to Plaintiff's dental issues.

The Magistrate Judge found that Plaintiff "has suffered from poor dental health for several years" and "[p]rior to Thanksgiving 2017, he began to request teeth that were causing him pain be extracted." (Recommendation (Doc. 35) at 3.) These facts are not disputed.

Furthermore, although there is evidence that Plaintiff requested that his teeth be extracted, (Doc. 33-2, 33-3; Poole

Aff. (Doc. 31-1) at 17), the specific evidence as to the conditions of confinement and Plaintiff's dental issues do not establish deliberate indifference or any retaliation.

The medical records, attached to Defendant Poole's affidavit as Exhibit C, are not disputed. Those records reflect that on January 13, 2018, Plaintiff filed a request for an administrative remedy. (Poole Aff. (Doc. 31) ¶ 12; (Doc. 31-1) at 17.) In that request, he described the fact that food incompatible with his teeth "cause [] horrendous pain" and he wanted those teeth extracted "immediately." (Id.) On January 31, 2018, Plaintiff signed a form in which he was advised that "[t]his patient is on the waiting list and will be seen as soon as possible, if it is an emergency he should declare an emergency." (Id. at 18.) Plaintiff appealed, and on February 1, 2018, the finding was upheld. (Id. at 19.) Plaintiff appealed that decision to the Secretary, and March 14, 2018, the finding was upheld. (Id. at 20.) The record is not disputed and establishes Plaintiff's grievance was reviewed, responded to, and Plaintiff was offered a remedy or the possibility of immediate treatment by declaring an emergency. Plaintiff did not take that step, but instead awaited the results of the appeal process through March 14, 2018. The records submitted by Defendants do not reflect any further requests by Plaintiff

after January 13, 2018, and Plaintiff makes no allegation that he submitted such a request. More pointedly, there is no evidence Plaintiff ever declared an emergency as he was instructed.

Instead, the medical records indicate, without objection or contradiction, that Plaintiff began a hunger strike possibly as early as March 11, 2018. (See id. at 33, 77). The records reflect that Plaintiff was seen regularly by medical staff between March 11, 2018 and March 23, 2018, checking his condition during the declared hunger strike. (See id.) None of those medical records reflect that Plaintiff made a request for dental examination or treatment. (See generally id. at 28-77.) Plaintiff submits no evidence that he made a request for dental examination or declared a dental emergency during that time. It is not clear when the hunger strike may have ended, but on April 3, 2018, the medical notes indicate a standard order for dietary recommendations was entered. (Id. at 27.)

On April 26, 2018, Plaintiff was seen for a dental examination. (Id. at 96-97.)

As the Magistrate Judge recognized,

> "A claim of deliberate indifference . . . implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." White ex rel. White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997). "[A] prison official cannot be found liable under the Eighth

> Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety . . . ." Farmer [v. Brennan,] 511 U.S. [825] at 837 [1994].

(Recommendation (Doc. 35) at 13.) An extended period of time between the time Plaintiff filed his administrative request for treatment, (Poole Aff. (Doc. 31-1) at 17,) and the time when he actually received treatment, (id. at 96-97), could be suggestive of deliberate indifference to Plaintiff's dental needs, depending upon the circumstances. Nevertheless, Plaintiff was advised of an opportunity to receive immediate treatment - declare an emergency - and Plaintiff refused to do so, whether willfully or otherwise. Furthermore, Plaintiff engaged in a hunger strike for a substantial period of that time, and in spite of the fact he received some type of medical examination regularly, he never requested dental treatment, emergency or otherwise. No evidence has been presented as to any attempts between November 2017 and January 13, 2018, by Plaintiff to receive treatment, although there is one note of a dental examination in September and the fact Plaintiff would be placed on a waiting list. (Poole Aff. (Doc. 31-1) at 18.) The evidence between January 13, 2018, and April 26, 2018, is that Plaintiff made no requests for dental treatment, emergency or otherwise, during a time when he was regularly examined by medical personnel.

Under these circumstances, Plaintiff has failed to demonstrate prison officials were deliberately indifferent to his medical needs, nor does the evidence show prison officials disregarded an excessive risk to inmate health or safety.

The court finds Plaintiff's objections do not change the substance of the United States Magistrate Judge's Recommendation, (Doc. 35), and therefore adopts the Recommendation.

IT IS THEREFORE ORDERED that the Magistrate Judge's Recommendation, (Doc. 35), is **ADOPTED. IT IS FURTHER ORDERED** that Defendants' Motion for Summary Judgment, (Doc. 30), is **GRANTED** and that this action is **DISMISSED.** A Judgment dismissing this action will be entered contemporaneously with this Order.

This the 31st day of March, 2020.

William L. Osteen, Jr.
United States District Judge

APPENDIX
"C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CASEY RAFEAL TYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17CV1104
	)	
KATY POOLE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on Defendants Katy Poole and Lachelle Bullard's motion for summary judgment (Docket Entry 30). Plaintiff Casey Rafeal Tyler has filed a response. (Docket Entry 33.) For the reasons stated herein, the Court will recommend that Defendants' motion for summary judgement be granted.

I. BACKGROUND

The following facts arise from the parties' affidavits and exhibits.

A. The Parties

Plaintiff is a *pro se* prisoner of the State of North Carolina and was previously incarcerated in Scotland Correctional Institution ("Scotland"). (*See* Complaint ¶¶ I(A), IV(B), Docket Entry 2.) Scotland is a facility in the North Carolina Department of Public Safety, Division of Adult Correction and Juvenile Justice ("NCDPS"). Defendant Poole has been the Correctional Facility Administrator for Scotland since December 2014 (Affidavit of Katy Poole ¶ 3, Docket Entry 31-1.) Defendant Bullard has been a Classification Coordinator for Scotland since December 2014. (Affidavit of Lachelle Bullard ¶ 3, Docket Entry 31-2.) Her

duties include processing promotions and demotions of Scotland inmates' custody classifications and levels. (*Id.* ¶ 6.)

B. The Original Complaint

On December 7, 2017, Plaintiff commenced the instant action by filing a complaint under 42 U.S.C. § 1983 against Defendant Poole. (Compl. ¶ II(A).) Plaintiff alleged violations of his rights under the First, and Eighth, and Fourteenth Amendments. (*Id.* ¶ II(B).) Plaintiff's subsequent briefing clarifies that his claims under the First Amendment are for alleged violations of his rights to freely exercise his religion and freely associate. (*See* Docket Entry 33 at 1, 4.) The facts discussed here pertain to the claims in this complaint.

In July 2017, Scotland reviewed its feeding procedures, and Defendant Poole approved a new policy for the dining hall.[1] (Poole Aff. ¶ 8; Ex. A at 1-6, Docket Entry 31-1.) Per the policy, inmates would no longer be permitted to select the seat and table where they could eat; instead, they would be directed by prison staff to a seat once they exited the serving line. (Ex. A at 4, Docket Entry 31-1.) The purpose of this policy is "to ensure that the inmates confined at Scotland were provided a safer and more secure environment while eating in the dining hall." (Poole Aff. ¶ 8.)

This policy has affected Plaintiff in a number of ways. Plaintiff, who practices Islam, has been required by prison staff to "sit at tables with bloods [sic], crips [sic], gangster disciples [sic], and various mexican [sic] gang members . . . as well as guys that . . . hate Islam" despite his unwillingness to do so. (Affidavit of Casey Rafeal Tyler at 2, Docket Entry 34.) He has

[1] Plaintiff states in his Complaint that the policy has been in effect since November 2015. (Compl. ¶ IV(B)-(C).)

also been required to sit at tables where other inmates are eating pork, which he states is prohibited by his faith. (*Id.* at 3.) Additionally, Plaintiff is fearful because at least some of the seats requires inmates to sit close and with their backs to the dining hall serving line, which leaves them vulnerable to an attack by another inmate. (*Id.* at 1.) The only alternative Plaintiff has to sitting as directed is to forfeit his meal. (*Id.* at 3.)

Defendant Poole filed her answer to this complaint on March 9, 2018. (Docket Entry 2018.) On November 27, 2018, Plaintiff was transferred to Polk Correctional Institution, where he currently resides. (Bullard Aff. ¶ 11.)

C. The Supplemental Complaint

On December 13, 2018, Plaintiff filed a supplemental complaint, alleging new § 1983 claims against both Defendants Poole and Bullard. (Supp. Compl., at 4-6, Docket Entry 23.) Specifically, Plaintiff alleges a First Amendment retaliation claim against Defendant Poole, an Eighth Amendment claim against both Defendants, a Fourteenth Amendment Due Process claim against both Defendants, and a Fifth Amendment Double Jeopardy Claim against Defendant Bullard. (*Id.*) The facts discussed here pertain to the claims alleged in the supplemental complaint.

Plaintiff has suffered from poor dental health for several years. (*See* Tyler Aff. at 4.) Prior to Thanksgiving 2017, he began to request teeth that were causing him pain be extracted. (Ex. C at 1, Docket Entry 31-1.) Despite his requests to see a dentist for treatment, he was not seen until April 26, 2018, when he had a tooth pulled after the dentist found "extensive decay." (*Id.* at 81.) Plaintiff had a second tooth pulled on July 19, 2018 (*id.* at 72), and a third

on September 6, 2018 (*id.* at 68). Plaintiff attributes his dental health problems, in part, to Scotland's failure to provide dental floss to inmates in Control Housing. (Tyler Aff. at 3-4.)

On January 1, 2018, Plaintiff left regular population housing at Scotland and applied for protective control housing because he had "missed many meals trying to avoid dining hall staff" and could not "continue to put up with their hostility peaceably." (Ex. F at 2, Docket Entry 31-2.) Additionally, he feared retaliation from Defendant Poole for filing his original complaint in the instant lawsuit. (*Id.*)

NCDPS' protective control policy at the time required that "a determination must be made that the offender's request [for protective control housing] is legitimate and that Restrict Housing is necessary for the continued well-being of the offender." (Ex. C at 1, Docket Entry 31-2.) In accordance with that policy, a non-party NCDPS employee investigated Plaintiff's allegations. (*See* Ex. C at 1, Docket Entry 31-2; Ex. F at 1, Docket Entry 31-2.) In late January 2018,[2] that investigator issued a recommendation to deny Plaintiff's request for protective control housing due to insufficient evidence. (Ex. F at 1, Docket Entry 31-2.) Upon receipt of a copy of the investigation report, Defendant Bullard ordered that Plaintiff be removed from protective custody. (Bullard Aff. ¶ 13.)

Subsequently, on January 23, 2018, a non-party employee of NCDPS ordered Defendant to return to regular population. (Ex. E at 14, Docket Entry 31-2.) However, Defendant refused to do so. (*Id.*) Defendant was charged with a B-25 infraction for failure to obey a prison official's lawful order. (Bullard Aff. ¶ 12; Ex. E at 6, Docket Entry 31-2.)

[2] The investigator submitted his recommendation on January 19, 2018 to the shift officer-in-charge, a non-party, who signed the document on January 22, 2018. (Ex. F at 1, Docket Entry 31-2.)

Plaintiff was found guilty at a subsequent disciplinary hearing, which was conducted by a non-party hearing officer. (Ex. E at 2-3, Docket Entry 31-2.) The hearing officer also imposed sanctions on Plaintiff, including loss of 30 days of good-time credits. (*Id.* at 2.) Defendant appealed, but the decision was upheld by the chief disciplinary hearing officer. (*Id.* at 2.) In addition to the sanctions imposed by the hearing officer, Plaintiff was placed in control housing between March 8, 2018 and August 10, 2018. (Bullard Aff. ¶ 19.) He then was moved to modified housing, where he remained until he committed additional infractions on November 21, 2018. (*Id.*; Tyler Aff. at 7.)

Additionally, Plaintiff was instructed on February 13, 2018 to provide a urine sample for drug testing. (Ex. D at 1, Docket Entry 31-1.) When Plaintiff refused to comply, he was again charged with an infraction. (*Id.*) The disciplinary hearing officer dismissed this charge because proper procedures were not followed. (*Id.* at 3.)

Defendant Bullard filed her answer to the supplemental complaint on April 8, 2019. (Docket Entry 29.) Defendant Poole did not file an answer to the supplemental complaint. Defendants filed the instant motion for summary judgment, along with an accompanying brief and affidavits, on May 14, 2019. (Docket Entries 30, 31.) Plaintiff subsequently filed a response along with an affidavit[3] on June 17, 2019. (Docket Entries 33, 34.) The matter is ripe for disposition.

[3] Plaintiff's affidavit alleges additional wrongs committed against him, including beatings he received from third-party correctional officers after he set a mattress on fire in a cell block. (Tyler Aff. at 7-10.) However, because these claims were not alleged in either the original or supplemental complaint, the Court does not consider them.

II. DISCUSSION

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911, 913 (4th Cir. 1997). The party seeking summary judgment bears the initial burden of coming forward and demonstrating the absence of a genuine issue of material fact. *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir. 1991) (citing *Celotex v. Catrett*, 477 U.S. 317, 322 (1986)). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact which requires trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a fact finder to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 817 (4th Cir. 1995). Thus, the moving party can bear his burden either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is insufficient to establish his claim. *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting).

When making the summary judgment determination, the Court must view the evidence, and all justifiable inferences from the evidence, in the light most favorable to the non-moving party. *Zahodnick*, 135 F.3d at 913; *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 196 (4th Cir. 1997). However, the party opposing summary judgment may not rest on mere allegations or denials, and the court need not consider "unsupported assertions" or "self-serving opinions without objective corroboration." *Anderson*, 477 U.S. at 248-49; *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996).

Defendants raise several threshold issues that the Court now addresses.

A. Mootness

The Court first considers Defendants' argument that any claims raised by Plaintiff that seek injunctive or declaratory relief are moot, as Plaintiff is no longer incarcerated in Scotland. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for the purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam). However, a case that is not "live," but is "capable of repetition, yet evading review," is not moot. *Murphy*, 455 U.S. at 482. "[A]s a general rule, a prisoner's transfer or release from a particular prison moots his claims for injunctive and declaratory relief." *Rendelman v. Rouse*, 569 F.3d 182, 186 (4th Cir. 2009); *see also Incumaa v. Ozmint*, 507 U.S. 281, 286-287 (4th Cir. 2007). Here, Plaintiff's claims for injunctive or declaratory relief are moot because he is no longer incarcerated at Scotland. Nor are the claims here "capable of repetition, yet evading review" if he were to return to Scotland, as "he would have sufficient opportunity to re-initiate an action seeking injunctive relief." *See Rendelman*, 569 F.3d at 186. Therefore, Plaintiff's claims for injunctive or declaratory relief cannot survive and should be dismissed.

B. Sovereign Immunity

The Court next considers Defendants' argument that any claims seeking monetary damages that are brought against them in their official capacities are barred by the Eleventh Amendment. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dept. of State Police*,

491 U.S. 58, 71 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). It follows that just as "the Eleventh Amendment bars a damages action against a state in federal court," it also bars suits against state officials in their official capacity. *Kentucky v. Graham,* 473 U.S. 159, 169 (1985). Here, both Defendants are officials of the State of North Carolina. (*See* Poole Aff., ¶ 3; Bullard Aff., ¶ 3.) Therefore, claims seeking damages that are brought against them in their official capacity are barred and should be dismissed.

C. Qualified Immunity

The Court finally considers Plaintiff's damage claims against Defendants in their individual capacity. Defendants have raised the defense of qualified immunity as to all claims. Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Pidpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) ("Qualified immunity shields government officials performing discretionary functions from personal-capacity liability for civil damages under § 1983...."). Thus, the two-step qualified immunity inquiry requires a court to determine (1) whether Plaintiff has alleged facts that make out a violation of a constitutional right and (2) whether that right was clearly established at the time of the violation. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Booker v. South Carolina Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017). The Court may consider the prongs of the test in any order. *Pearson*, 555 U.S. at 236.

"To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks and alteration omitted). In determining whether a right is clearly established, the Court first considers controlling authority in the jurisdiction, i.e. the decisions of the United States Supreme Court, the Fourth Circuit Court of Appeals, and the North Carolina Supreme Court. *See Booker*, 855 F.3d at 538. Where there is no controlling authority, the Court may consider persuasive authority from other jurisdictions. *Id.* at 539. "It is important to emphasize that [a qualified immunity] inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (internal quotation marks omitted) (quoting *Saucier v. King*, 533 U.S. 194, 201 (2001)).

The Court concludes that Defendants have qualified immunity with regard to every remaining claim. Therefore, all claims must be dismissed.

1. First Amendment Free Exercise of Religion[4]

Plaintiff argues that Defendant Poole has violated his rights under the First Amendment Free Exercise Clause by approving and enforcing the seating policy. (*See* Docket Entry 4-7.) The Court concludes that Defendant Poole is entitled to qualified immunity.

"In order to state a claim for violation of rights secured by the Free Exercise Clause, an inmate, as a threshold matter, must demonstrate that: (1) he holds a sincere religious belief; and (2) a prison practice or policy places a substantial burden on his ability to practice his

[4] Plaintiff does not bring a claim under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*

religion." *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (citing *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). A substantial burden occurs when a policy or practice places substantial pressure on the inmate to violate his beliefs or change his behavior. *Id.* "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). In determining whether a prison regulation is reasonable, courts consider several factors: (1) whether there is a valid, rational connection between a legitimate government interest and the regulation; (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) whether there are ready alternatives to the regulation. *Id.* at 89-91. An inmate's "First Amendment rights may be restricted in the interest of prison security." *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993) (discussing the rights of pretrial detainees); *see also Bell v. Wolfish*, 441 U.S. 520, 545-547 (1979) (same).

The Court assumes here that Plaintiff has alleged the violation of a constitutional right.[5] Nonetheless, Defendant Poole has qualified immunity because the right of a prisoner to

[5] Here, Defendant Poole does not challenge the sincerity of Plaintiff's religious beliefs, but instead argues that it does not place a substantial burden on his ability to practice them. (Docket Entry 16.) The Court disagrees. Plaintiff states that his religious beliefs do not permit him to eat at the same table as individuals who are dining on pork, or with individuals who otherwise ridicule Muslim religious practices or commit wrongful acts. (Docket Entry 33 at 5-6.) Therefore, the policy places a substantial burden on his religious beliefs when he is directed to sit with people he views as wrongdoers, including those who are eating pork. Unfortunately, the briefing makes it difficult for the Court go further and engage with the *Turner* factors. Most notably, Defendant Poole has arguably failed to demonstrate a nexus between the seating policy and a legitimate government interest. She states in her affidavit that the policy was adopted "to ensure that the inmates confined at Scotland were provided a safer and more secure environment while eating in the dining hall."

decline sitting with or near others who are dining on food forbidden by the prisoner's religion, or otherwise engaging in conduct prohibited by his religion, when his religion does not permit such association, is not clearly established. While there are a number of cases pertaining to a prisoner's right to consume meals in accordance with his religious beliefs, *see, e.g., Carter*, 879 F.3d 132, there do not appear to be any decisions holding that a prisoner has the right to not dine with other individuals, even if doing so is prohibited by the prisoner's religion. Therefore, Defendant Poole is entitled to qualified immunity and this claim should be dismissed.

2. First Amendment Freedom of Association

Plaintiff's claim that Defendant Poole has violated his First Amendment right to freedom of association by approving and enforcing the seating policy (Docket Entry 34 at 1-4) also fails to overcome Defendant Poole's qualified immunity, as Plaintiff has not alleged a violation of a constitutional right. "While the First Amendment does not in terms protect a 'right of association,' [the Supreme Court] has recognized that it embraces such a right in certain circumstances." *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989). Both "intimate association" and "expressive association" are protected by the First Amendment, "social association" is not. *Id.* at 25. Here, even if the Court were to ignore Plaintiff's incarceration and the permitted burdens on his freedom of association, *see Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) ("[F]reedom of association is among the rights least compatible with incarceration."), Plaintiff has not alleged a violation of a constitutional right. Plaintiff seeks to choose for himself with whom who he will, and will not, dine. (*See* Docket Entry 33 at 1.)

(Poole Aff., ¶ 8.) However, while safety is a legitimate government interest, Defendant Poole has not provided, nor will the Court speculate, how the seating policy furthers that interest.

This is neither an intimate or expressive association protected by the First Amendment. Furthermore, even if Plaintiff has alleged a violation of a constitutional right, that right is not clearly established. Therefore, there is no dispute of material fact regarding Defendant Poole's qualified immunity and Plaintiff's claim should be dismissed.

3. Eighth Amendment Cruel and Unusual Punishment (Seating Policy Claim)

Plaintiff next claims that Defendant Poole has violated his Eighth Amendment right to be free of cruel and unusual punishment by approving and enforcing the seating policy. (Docket Entry 8-9.) Defendant Poole is entitled to qualified immunity and this claim should accordingly be dismissed.[6]

Plaintiff has failed to allege a violation of a constitutional right. "The Eighth Amendment, which prohibits infliction of 'cruel and unusual punishments,' applies to claims by prisoners against corrections officials challenging conditions of confinement." *Porter v. Clarke*, 923 F.3d 348, 355 (2019) (citations omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("The [Eighth] Amendment also imposes duties on [correctional] officials, who must provide humane conditions of confinement . . .."). Eighth Amendment condition-of-confinement claims are evaluated by a two-part test that has both an objective and subjective

[6] Defendant Poole characterizes Plaintiff's claim here as a complaint of conditions of confinement. (Docket Entry 31 at 7.) Plaintiff disputes this characterization and appears to argue that he has been excessively punished for some unspecified conduct of his. (Docket Entry 33 at 8.) The Court agrees with Defendant Poole. Plaintiff contends that correctional officers directed him into situations where he was physically vulnerable and threatened violence against him if he does not comply (*see* Docket Entry 33 at 8), but such allegations comfortably fall within the conditions-of-confinement framework. *See Farmer v. Brennan*, 511 U.S. 825, 829, 834 (1994) (applying the test for conditions-of-confinement cases when an incarcerated plaintiff alleged that prison officials were deliberately indifferent to her safety).

component. *Id.* "First, the deprivation alleged must be, objectively, sufficiently serious." *Farmer*, 511 U.S. at 834 (internal citations and quotation marks omitted). To be "sufficiently serious," "a prison official's act or omission must result in the denial of 'the minimal civilized measures of life's necessities.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Second, "a prison official must have a sufficiently culpable state of mind." *Id.* (internal quotation marks omitted) (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). In this context,[7] "that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* (quoting *Wilson*, 501 U.S. at 302-303). "A claim of deliberate indifference . . . implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice." *White ex rel. White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety . . .." *Farmer*, 511 U.S. at 837.

Plaintiff's claim does not satisfy either prong of the test for an Eighth Amendment condition-of-confinement claim. First, the alleged deprivation suffered by Plaintiff—his inability to sit where he pleases in the dining hall and being forced at times to sit with people he finds repugnant or dangerous—is not sufficiently serious. Second, alleged facts in Plaintiff's complaints do not indicate that Defendant Poole acted with deliberate indifference

[7] There is a subset of condition of confinement cases—those in which prison officials are accused of excessive force—that require a higher level of fault on the part of defendant prison officials, *see Whitley v. Albers*, 475 U.S. 312, 320-321 (1986), but the Court need not determine whether that standard applies, since it concludes that Plaintiff fails to meet the more common and less demanding deliberate indifference fault standard.

to Plaintiff's safety (*see* Compl. ¶¶ IV(D)-VI), nor does any evidence in the record. Indeed, Plaintiff even states in his brief that he never informed correctional officers that some of the people he objected sitting with were, to his knowledge, gang members, instead relying on other excuses. (Docket Entry 34 at 2-3.) Additionally, there is no genuine dispute of material fact regarding whether Defendant Poole was deliberately indifferent to Plaintiff's health or that of other inmates. Defendant Poole indicates in her affidavit that she did not know of Plaintiff's complaints regarding the seating policy, until she was served with the lawsuit, and nothing in the record contradicts this assertion. (*See* Poole Aff. ¶ 10.) The Court concludes Plaintiff has not alleged facts demonstrating a violation of a constitutional right, there is no dispute of material fact regarding Defendant Poole's qualified immunity, and Plaintiff's claim should be dismissed.

4. Retaliation Claim Against Defendant Poole

Plaintiff's retaliation claim against Defendant Poole cannot survive. Plaintiff alleges that Defendant Poole retaliated against Plaintiff, in violation of the First Amendment, for his filing of the original complaint against her by punishing him via prison disciplinary procedures and requiring him to provide a urine sample for a drug test. (Supp. Compl. at 4-5.) To succeed on a retaliation claim under § 1983, Plaintiff must establish that "(1) [he] engaged in protected First Amendment activity, (2) [Defendant Poole] took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and [Defendant Poole's] conduct." *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). "[A] plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a 'person of ordinary firmness' from the exercise of First

Amendment rights." *Id.* at 500 (quoting *Washington v. County of Rockland*, 373 F.3d 310, 320 (2nd Cir. 2004)). In the context of prison disciplinary proceedings, "[C]laims of retaliation must . . . be regarded with skepticism" because "[e]very act of discipline by prison officials is by definition 'retaliatory' in the sense that it responds directly to prisoner misconduct." *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994).

Here, while Plaintiff successfully alleges that he engaged in a protected First Amendment activity, *see Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 387 (2011) ("The Petition Clause [of the First Amendment] protects the rights of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."), his allegations that Defendant Poole took action that adversely affected that right are conclusory (*see* Supp. Compl. at 4-5). Furthermore, the record demonstrates that Defendant Poole did not participate in Plaintiff's disciplinary hearing for the B-25 infraction, except for her refusal to be called as a witness by Plaintiff.[8] (*See* Ex. E, Docket Entry 31-2.) Nor does the record indicate that Defendant Poole was involved in the decision to drug-test Plaintiff or bring the subsequent charges against him when he refused to provide a urine sample. (*See* Ex. D, Docket Entry 31-1.) Therefore, there is no genuine dispute of material fact regarding Defendant Poole's lack of involvement in the allegedly retaliatory acts, Defendant Poole is entitled to qualified immunity, and Plaintiff's retaliation claim should be dismissed.

[8] Plaintiff does not allege that Defendant Poole retaliated against by refusing to appear as a witness, but rather states that she "brought the charge" against him. (Docket Entry 23 at 4.)

5. Eighth Amendment Cruel and Unusual Punishment (Dental Health Claim)

Plaintiff's claim that both Defendants have violated his Eighth Amendment right to be free of cruel and unusual punishment by ignoring his dental problems (Supp. Compl. at 5) also should be dismissed. The Court concludes that Plaintiff has not alleged a violation of a constitutional right. Therefore, both Defendants are entitled to qualified immunity.

Plaintiff has not alleged an Eighth Amendment violation here because, even assuming the loss of several teeth due to delayed medical treatment is sufficiently serious, Plaintiff has not alleged facts demonstrating that Defendants were deliberately indifferent. While Plaintiff alleges that he had tried to receive dental treatment for several months, he at no point states that either Defendant had notice of these attempts, nor does the record indicate that either knew of these problems prior to the commencement of the instant suit.[9] Indeed, it is not even apparent that Defendant Bullard's responsibilities had anything to do with the provision of medical services. (*See* Bullard Aff. ¶ 3). Because Defendants could not be deliberately indifferent of Plaintiff's dental health without notice of the problems he was facing, *see White*, 112 F.3d at 737, Plaintiff has not alleged facts that constitute a violation of the Eighth Amendment. Defendants therefore have qualified immunity, and this claim should be dismissed.

[9] Plaintiff states in his supplemental complaint that, upon applying for protective custody, he completed and signed a witness statement that "alleged that dining hall staff would not let [him] eat in peace in the dining hall [and] that [he] had been trying to get [his] teeth pulled since around Thanksgiving 2017 [and] hadn't been seen by the dentist yet." (Supp. Compl. at 1.) However, the statement in fact makes no mention of Plaintiff's dental health problems. (*See* Ex. F at 1, Docket Entry 31-2.)

6. Eighth Amendment Cruel and Unusual Punishment (Classification Claim)

Plaintiff's claim that both Defendants violated his right to be free of cruel and unusual punishment by assigning him to punitive segregated housing for over 150 days after his conviction of an infraction (Supp. Compl. at 5-6) also fails. Plaintiff has not alleged a constitutional violation here because he has not demonstrated a sufficiently serious deprivation. *See In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 471-472 (4th Cir. 1999) (holding that three years of solitary confinement is not a "serious deprivation of a basic human need" when plaintiffs have only alleged a "depressed mental state" as a result of confinement). Furthermore, Plaintiff does not allege deliberate indifference on the part of the Defendants with regard to his classification. Therefore, Defendants have qualified immunity and this claim should be dismissed.

7. Fourteenth Amendment Due Process

Plaintiff's claim that both Defendants violated his right to due process by denying him protective custody (*id.* at 6) is subject to qualified immunity because Plaintiff has failed to allege the violation of a constitutional right. "The federal constitution itself vests no liberty interest in inmates in retaining or receiving any particular security or custody status "'[a]s long as the [challenged] conditions of confinement . . . is within the sentence imposed . . . and is not otherwise violative of the Constitution.'" *Slezak v. Evatt*, 21 F.3d 590, 594 (4th Cir. 1994) (alterations in original) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468 (1983)). A liberty interest in a particular custody classification can arise from state law that places "substantive limitations on official discretion." *Id.* (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)). Yet Plaintiff does not allege that Defendants departed from state procedures regarding protective control.

(*See* Suppl. Compl. at 6; *see also* Poole Aff. at 32-35.) Therefore, Plaintiff has not alleged a constitutional violation, Defendants have qualified immunity, and Plaintiff's claim should be dismissed.

8. Sixth Amendment Double Jeopardy

Plaintiff's claim that Defendant Bullard punished him for a disciplinary violation for which he was already sanctioned by the disciplinary hearing officer, and thus violated the Fifth Amendment Double Jeopardy Clause, (Supp. Compl. at 6) also fails in light of Defendant Bullard's qualified immunity. "[T]he Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could . . . be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 98-99 (1997) (emphasis in original) (citations omitted). Prison disciplinary sanctions are not criminal punishments, and thus are not subject to the Double Jeopardy Clause. *See Fogle v. Pierson*, 435 F.3d 1252, 1261-1262 (10th Cir. 2006) (holding that prison disciplinary sanctions do not implicate the Double Jeopardy Clause); *Feaster v. Mueller*, No. 1:18CV2705, 2018 WL 6045263 (D.S.C. Oct. 10, 2018) (same), *adopted by*, 2018 WL 6040840 (D.S.C. Nov. 11, 2018). Therefore, no violation of a right occurred here, and even if one did, said right is not clearly established. Therefore, no genuine issue of material fact exists to question Defendant Bullard's qualified immunity, and this claim must be dismissed.

III. CONCLUSION

For the reasons stated herein, **IT IS HEREBY RECOMMENDED** that Defendants' Motion for Summary Judgment (Docket Entry 30) be **GRANTED**, and that this action be dismissed.

Joe L. Webster
United States Magistrate Judge

November 25, 2019
Durham, North Carolina

APPENDIX
"D"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CASEY RAFEAL TYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17CV1104
	)	
KATY POOLE,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on Plaintiff Casey Rafael Tyler's motion for an injunction and restraining order. (Pl.'s Mot., Docket Entry 14.) For the reasons stated herein, the undersigned recommends that this motion be denied.

BACKGROUND

Plaintiff, a *pro se* prisoner housed at the Scotland Correctional Institution, filed a Complaint pursuant to 42 U.S.C. § 1983 alleging as follows: beginning in 2015, Defendant instituted a policy of assigning seats during meals for prisoners. (*See* Compl. ¶ IV(C)-(D), Docket Entry 2 at 5.) Plaintiff claims that as a result,

> When I eat in the dining hall, I am under threat of violence from prison staff, [and] forfeiture of my right [and] opportunity to eat, if I don't take my meal to the exact seat they tell me to occupy. They force me to sit at 4-seat tables with gang members, people who eat like slobs, sick people visibly [and] audibly [sneezing and] coughing at the table, troublemakers, [and] people eating swine [and] otherwise ridiculing the Signs of Allah, Who, in the Qur'an, forbids me (as a Believer therein) from sitting with such people.

> This is Katy Poole's operation, enforced by ALL her underlings who work in the dining hall.

(*Id.* ¶ IV(D).) As to his injuries, Plaintiff alleges he has suffered

> Emotional distress. I have not been injured bodily in this case except that I've gotten sick twice in a five week period ([sore] throat, leaky nose), but assaults have occurred in the dining hall in recent months [and] prison guards love to seat me where a line of inmates will be standing [and] moving right behind me—so, I am sometimes in danger of a blind-side attack, were another inmate so inclined. And the only reason I have not been assaulted by the guards on this matter is because I miss meals when I feel that I cannot tolerate their bullshit, or I otherwise go out of my way to avoid that fight. But certainly [I believe] my rights are under perpetual assault her. Nor do I fear them, or to meet their threatened violence with my own if they persist.

(*Id.* ¶ V.)

Plaintiff seeks a restraining order that will transfer him to Central prison, permit him to sit where he chooses at mealtimes or take his meal to his cell, and declaratory relief.[1] (*Id.* ¶ VI.) He also seeks $200,000 in punitive damages or any other damages to which he is entitled. (*Id.*)

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[1] In his prayer for relief, Plaintiff adds,

> Otherwise, the court can arraign me on felony charges where I stabbed the shit out of the next asshole who dares to get in my face, trying to play musical fucking chairs with me, when I'm already seated [and] all I want to do is eat my fucking food [and] leave--[and] not be looking over my shoulder at the gang standing right behind me, within arm's reach; or hover over my own plate to prevent stuff from landing in it out of somebody else's mouth 'cause they don't know how to eat except like a freakin' barbarian! Or whatever the case may be, stressing me the fuck out unnecessarily. . . . And make no mistake: I seek an IMMEDIATE restraining order, 'cause I'm not going to keep missing meals just to avoid Katy Poole's Thugs who can't wait to beat me up over a fucking seat, [and] (as the Court can probably tell) I have been as PATIENT as I'm gonna be. Come 2018, I'm standing my ground against these clowns if they threaten me in that dining hall.

(Compl. ¶ VI.)

In the instant motion, Plaintiff alleges that he filed for protective custody ("PC") and "took [himself] to seg," to seek relief from Defendant's meal-seating policy. (Pl.'s Mot. at 1-2, Docket Entry 14.) A prison official named Sergeant Miles told Plaintiff to return to the general population or face disciplinary action. (*Id.* at 2.) Thereafter, Plaintiff received a notice of an impending disciplinary action. (*Id.*) Plaintiff alleges that Defendant is retaliating against him by refusing to allow Plaintiff to eat in "seg" unless he is "there under a punitive status." (*Id.*) He therefore seeks a preliminary injunction and asks the Court to "restrain [Defendant] from prosecuting [him] for his decision to seek PC" to avoid the seating policy; or, if he is prosecuted and convicted for seeking PC, to address and reverse or stay the verdict and penalties associated with any conviction arising from that refusal. (*Id.* at 3.)

DISCUSSION

A party seeking a preliminary injunction or temporary restraining order[2] must establish all four of the following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *see also The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009), *overruling Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977).[3] A party must make a clear showing that he is likely to

[2] The substantive standard for granting either a temporary restraining order or a preliminary injunction is the same. *See e.g., United States Dept. of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1 (4th Cir. 2006).

[3] The original decision in *Real Truth* was vacated by the Supreme Court for further consideration in light of *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). However, the Fourth Circuit reissued its opinion on Parts I and II of its earlier opinion in the case, 575 F.3d at 345-47, stating the

succeed on the merits of his claim. *Winter*, 555 U.S. at 20; *Real Truth*, 575 F.3d at 345-46. Similarly, he must make a clear showing that he is likely to be irreparably harmed absent injunctive relief. *Winter*, 555 U.S. at 20-22; *Real Truth*, 575 F.3d at 347. Only then does the court consider whether the balance of equities tips in the favor of the party seeking the injunction. *See Real Truth*, 575 F.3d at 346-47. Finally, the court must pay particular regard to the impact of the extraordinary relief of an injunction upon the public interest. *Real Truth*, 575 F.3d at 347 (quoting *Winter*, 555 U.S. at 23-24). Injunctive relief, such as the issuance of a preliminary injunction, is an extraordinary remedy that may be awarded only upon a clear showing that the plaintiff is entitled to such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *see also MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (citation and quotation omitted) (a preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances").

Here, Plaintiff has failed to make the requisite showing for preliminary injunctive relief. At this point in the proceedings Plaintiff has not made a "clear showing" that he is likely to succeed on the merits. *Winter*, 444 U.S. at 22. The Supreme Court has repeatedly stressed the need to provide wide-ranging deference to prison administrators in matters of prison management. *See Beard v. Banks*, 548 U.S. 521, 528 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.").

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facts and articulating the standard for issuance of a preliminary injunction, before remanding it to the district court for consideration in light of *Citizens United*. *See The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 607 F.3d 355 (4th Cir. 2010).

Here, Plaintiff has merely stated that Defendant has created and enforced a policy that assigns seating at meal times and has declined to make an exception to this policy to accommodate Plaintiff's preference. Thus, Plaintiff has not made a clear showing of likelihood of success on the merits.

Additionally, Plaintiff has failed to show that he will suffer irreparable harm if an injunction is not issued. Plaintiff has alleged no bodily harm except for an illness which he has not shown to be clearly attributable to Defendant's policy. Neither has he pleaded facts to support his claim of emotional distress. Rather, Plaintiff relies primarily on possible future harm in the form of assault by other prisoners or guards, or disciplinary action by Defendant. But speculative injury cannot constitute irreparable harm. *See Dunn v. Fed. Bureau of Prisons,* No. 5:12CV55, 2013 WL 365257, at *2 (N.D.W. Va. Jan. 30, 2013) (citing *Caribbean Marine Services Co. v. Baldridge,* 844 F.2d 668, 674 (9th Cir. 1988)). Plaintiff has therefore failed to adequately show any likelihood of irreparable harm.

Even if Plaintiff had shown both a likelihood of success on the merits and that he would suffer irreparable harm absent a preliminary injunction, Plaintiff has not shown that the balance of equities tips in his favor or that an injunction is in the public interest. As previously noted, Courts should generally defer prison administrators in matters of prison management and discipline. *See Beard,* 548 U.S. at 528; *Overton,* 539 U.S. at 131-32; *Dunn,* 2013 WL 365257, at *3 (citing *Bell v. Wolfish,* 441 U.S. 520 (1979)) ("[I]t is not the position of this Court to interfere in the administration of prisons and the discipline of inmates."). Thus, the balance of equities in this situation does not favor Plaintiff, and the Court cannot conclude that the public interest would be served by court involvement in mealtime seating preferences in

prisons or the disciplinary action a prisoner faces when he refuses to adhere to such policies. *Keith v. Merch.*, No. 1:13-CV-2721-RMG-SVH, 2014 WL 3799063, at *4 (D.S.C. July 29, 2014) (citing *Wetzel v. Edwards*, 635 F.2d 283, 288 (4th Cir.1980) ("The possible injury to the [prison administrators] if the preliminary injunction stands is potentially grave.")). Accordingly, the undersigned recommends that Plaintiff's motion for a preliminary injunction be denied.

CONCLUSION

For the reasons stated herein, **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion for an Injunction and Restraining Order (Docket Entry 14) be **DENIED**.

Joe L. Webster
United States Magistrate Judge

September 6, 2018
Durham, North Carolina

Additional material from this filing is available in the Clerk's Office.