APPendix A

D. Conn.
20-cv-885
Covello, 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 27th day of April, two thousand twenty-one.

Present:

Robert D. Sack,
Raymond J. Lohier, Jr.,
Richard J. Sullivan,
Circuit Judges.

Christopher Daniel Everson,

Plaintiff-Appellant,

v. 21-17

Theresa Lantz, Commissioner of Corrections, et al.,

Defendants-Appellees.

Appellees move to dismiss the appeal as untimely filed and for summary affirmance. Upon due consideration, it is hereby ORDERED that the motion to dismiss as untimely is DENIED, but the motion for summary affirmance is GRANTED because the appeal "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* Fed. R. App. P. 26(a)(3).

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

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON, Plaintiff v. THERESA LANTZ, COMMISSIONER OF CORRECTIONS, JOHN ARMSTRONG, NELVIN LEVESTER, and ROBERT CARBONE, Defendants.	:	CASE NO. 3:20-cv-00885 (AVC)

JUDGMENT

This action having come before the Court for consideration of the defendants' motion to dismiss, before the Honorable Alfred V. Covello, United States District Judge; and

The Court having considered the motion and the full record of the case including applicable principles of law, and having granted the defendants' motion to dismiss on November 30, 2020, it is hereby,

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

Dated at Hartford, Connecticut, this 1st day of December, 2020.

ROBIN D. TABORA, Clerk

By: /s/ Michael Bozek
Michael Bozek
Deputy Clerk

Entered on Docket: 12/1/2020

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON, plaintiff,	:	
v.	:	Civil No. 3:20cv885(AVC)
THERESA LANTZ, et al., defendants.	:	

Ruling on the Defendants' Motion to Dismiss

This is an action for damages in which the plaintiff, Christopher Everson, alleges that the defendants, Connecticut Department of Correction (hereinafter "DOC") employees, terminated his employment with the DOC in violation of his constitutional rights. It is brought pursuant to 42 U.S.C. § 1983.[1] The defendants have filed a motion to dismiss based on, inter alia, the doctrine of res judicata, because Everson has filed two previous cases against these defendants. For the reasons that follow, the court concludes that Everson's prior cases preclude the claims in this case.

FACTS

The complaint and the court's public docket records[2] reveal the following facts.

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[1] 42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] Federal Rule of Evidence 201 provides that the court may take judicial notice of facts that "[are] not subject to reasonable dispute because [they]:

On March 5, 2004, Everson filed a complaint in this court. Everson v. Lantz, et al., 3:04cv387(RNC). In that case, Everson claimed that the same defendants named in the within action, violated his constitutional rights when they terminated his employment with the DOC.

On September 30, 2006, the court granted the defendants' motion for summary judgment in part and rendered judgment for the defendants on Everson's due process and "class of one" equal protection claims. On May 5, 2008, the defendants filed a supplemental motion for summary judgment. On February 4, 2009, the court granted the motion, rendered judgment in favor of the defendants and closed the case.

On March 2, 2009, Everson appealed the court's judgment and on July 13, 2009, the second circuit dismissed the appeal.

On October 14, 2009, Everson filed a petition for writ of certiorari to the U.S. Supreme Court. On October 4, 2010, the Court denied the petition. On November 15, 2011, the Court denied Everson's October 18, 2010 petition for rehearing.

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(1) [are] generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201; see also Kramer v. Time Warner, 937 F.2d 767, 773 (2d Cir. 1991).

On January 19, 2016, Everson filed a second lawsuit in this court. Everson v. Semple, et al., 3:16cv00077(RNC). That case was based on the facts alleged in the first case. On September 16, 2016, the court approved and adopted the magistrate judge's decision dismissing the case on res judicata grounds.

On October 4, 2016, Everson appealed the court's judgment in the second case.

On November 1, 2017, the second circuit dismissed that appeal.

On January 20, 2018, Everson filed a petition for writ of certiorari to the U.S. Supreme Court regarding the second case and on April 16, 2018, Court denied the petition. On June 11, 2018, the Court denied Everson's May 8, 2018 petition for rehearing.

On July 27, 2018, Everson filed a motion for relief from judgment in the first case.

On March 25, 2019, the court denied Everson's motion, brought pursuant to rule 60(b), and on April 4, 2019, Everson filed another appeal. On September 25, 2019, the second circuit dismissed the appeal. The court concluded that the appeal lacked "an arguable basis in law or fact." Everson filed another petition for a writ of certiorari to the Supreme Court, which, on January 13, 2020, the Court denied.

On April 6, 2020, Everson filed a motion to vacate the final judgment in the first case. That motion remains pending in that case.

On June 25, 2020, Everson filed the complaint in this case. On July 21, 2020, he filed an amended complaint.

In the amended complaint, Everson states that "[t]his is an [i]ndependent [a]ction to obtain relief from a judgment in a prior lawsuit, [p]ursuant to Federal Rules of Civil Procedure Rule 60(d)(1) . . . ." He maintains that "[t]his [i]ndependent action is to impeach and vacate a prior decree and judgment." Everson makes reference to "the original action" entitled Everson v. Lance, et al, 3:04cv387(RNC).

STANDARD

A court must grant a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), if a plaintiff fails to establish a claim upon which relief may be granted. Such a motion "asses(es) the legal feasibility of the complaint, [it does] not . . . assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When ruling on a 12(b)(6) motion, the court must "accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff." Broder v. Cablevision Sys. Corp., 418 F.3d 187, 196 (2d Cir. 2005). In

order to survive a motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The complaint must allege more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The court may consider only those "facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

DISCUSSION

The defendants argue, inter alia, that Everson's claims are barred by the doctrine of res judicata.[3] Specifically, the defendants state that the claims in Everson's two prior lawsuits are based on the same facts as the instant case and those claims have been fully litigated. With respect to Everson's argument that the court improperly failed to consider certain "comparators" in dismissing the equal protection claims, the defendants aver that such an argument could have been made in a

[3] The defendants also argue that the claims in this case are barred by the doctrine of collateral estoppel, the three year statute of limitations applicable to 42 U.S.C. § 1983 claims, the Eleventh Amendment, and the fact that Everson failed to properly serve the complaint on the individual defendants. Because the court concludes that the case is barred by the doctrine of res judicata, it does not reach these additional arguments.

prior case. The defendants cite the fact that this case involves the same parties and underlying claims as the prior cases and the facts here satisfy the standard for application of the doctrine of res judicata.

Everson argues in opposition that in this case he "pleads a direct attack upon the final judgment of the original lawsuit" and "that the final judgment and decision was 'wrong on the merits, by accident or mistake.'"[4] He states that he "has no other available or adequate remedy and the plaintiffs' own fault, neglect or carelessness did not create the situation for which he seeks equitable relief." According to Everson, "[t]his Independent Action does not plead the same claims and issues as the prior 1983 tort action; as outlined in Paragraphs 29 through 46 of the Independent Action, the plaintiff here seeks equitable relief, the cause of action is: 'if the truth and evidence of the matter had been examined, the result of the judgment would have been different . . . .'" He argues that he is not attempting to "re-litigate" claims from previous lawsuits and that "res judicata does not preclude a litigant from making a direct attack .... upon the judgment before the court which rendered the judgment." He cites Weldon v. United States, 70

[4] He states that the "final judgment did in fact overlook and not mention or examine any of the plaintiffs' named comparators, and the plaintiff is entitled to offer evidence to support his claim that the final judgment was 'wrong on the merits by result of accident or mistake.'"

F.3d 1, 5 (2d Cir. 1995), Campaniello Imports Ltd. V. Saporiti Italia, S.p.A., 117 F.3d 655, 662-663 (2d Cir. 1997), and "rule 60(b)'s 'savings clause.'" Everson reiterates that he "did in fact exercise all proper diligence in the original action" and states that the fact that DOC officials withheld his mail[5] left Everson "effectively unable to protect his appeal or monitor his appeal."

Pursuant to the doctrine of res judicata, "[a] final judgment 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) (quoting Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981)); Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275, 284 (2d Cir. 2000). Therefore, res judicata "'bar[s] litigations between the same parties if the claims in the later litigation arose from the same transaction[6]

[5] He notes that he was incarcerated at the time the court issued its opinion dismissing the original 2004 case and did not receive it until approximately 7 days prior to the date on which a motion for reconsideration was due. Everson points out that he did not receive the judgment in that case until after the time a motion for reconsideration was due. He states he requested an extension of time to appeal and that the DOC was holding his legal mail. Everson states that he had to resort to sending legal mail to his parents address in order to avoid the problem with the DOC holding his mail, which caused significant delays. With respect to the second case he filed in 2016, Everson states that he meant to file it as a request to set aside the judgment in the original 2004 case, pursuant to 28 U.S.C. sec. 1651(a). In 2012, Everson hired an attorney who had health problems and subsequently passed away. He avers this attorney was handling Everson's employment case from 2012-2015.

[6] The term "'transaction' refers to a 'common nucleus of operative facts.'" AmBase Corp. v. City Investing Liquidating Trust, 326 F.3d 63, 73 (2d Cir.

that formed the basis of the prior adjudication. . . .'" AmBase Corp. v. City Investing Liquidating Trust, 326 F.3d 63, 73 (2d Cir. 2003) (quoting Maldonado v. Flynn, 417 A.2d 378, 381 (Del. Ch. 1980)). The second circuit has recognized "the well-established rule that a plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories (with different evidence 'necessary' to each suit)." Waldman v. Village of Kiryas Joel, 207 F.3d 105, 110 (2d Cir. 2000) (citing Woods v. Dunlop Tire Corp., 972 F.2d 36, 39 (2d Cir. 1992)).

To determine whether a subsequent action is barred under the doctrine of res judicata, courts consider whether the earlier decision was "(1) a final judgment on the merits; (2) by a court of competent jurisdiction; (3) in a case involving the same parties or their privies; and (4) involving the same cause of action." EDP Med. Computer Sys. V. U.S., 480 F.3d 621, 624 (2d Cir. 2007). "It must first be determined that the second suit involves the same claim—or nucleus of operative fact—as the first suit." Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000) (internal quotations and citation omitted).

Everson cites Campaniello Imports Ltd. V. Saporiti Italia, S.p.A., 117 F.3d 665 (2d Cir. 1997), for the proposition that

2003) (quoting Schnell v. Porta Sys. Corp., 1994 WL 148276, at *4 (Del. Ch. April 12, 1994)).

"[r]es judicata 'does not preclude a litigant from making a direct attack ... upon the judgment before the court which rendered it.'" Id. at 661 (quoting Weldon v. United States, 70 F.3d 1, 5 (2d Cir. 1995) (quoting Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir. 1985)). However, in that case, involving a challenge to a prior settlement agreement, the second circuit cited rule 60(b) and noted that the "[c]laimants must (1) show that they have no other available or adequate remedy; (2) demonstrate that movants' own fault, neglect, or carelessness did not create the situation for which they seek equitable relief; and (3) establish a recognized ground—such as fraud, accident, or mistake—for the equitable relief." Id. at 662. In that case, the second circuit concluded that the plaintiff had failed to satisfy this standard and, therefore, "res judicata 'preclude[d] the parties or their privies from relitigating issues that were or could have been raised in that action." Id. at 663 (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). Further, in Weldon v. United States, 70 F.3d 1 (2d Cir. 1995), the plaintiff framed her claim as a "direct" action, but the second circuit concluded that "res judicata barred this independent action to void the judgment" where the claims "were raised or should have been raised by [the plaintiff] during the pendency of the earlier case . . . ." Id. at 5 (internal quotation and quotation marks omitted).

The defendants' motion to dismiss is granted based on the doctrine of res judicata. Although Everson repeatedly argues that this case is an "independent action" seeking to challenge the validity of the court's earlier judgment, he in fact seeks reversal of that judgment which, in turn, requires consideration of the claims forming the basis of the court's prior decision. The plaintiff has filed two previous cases, Everson v. Lantz, et al., 3:04cv387(RNC) and Everson v. Semple, et al., 3:16cv00077(RNC), based on the same claims that form the basis of the allegations in this case. Those cases both represent "(1) a final judgment on the merits; (2) by a court of competent jurisdiction; (3) in a case involving the same parties or their privies; and (4) involving the same cause of action." EDP Med. Computer Sys., Inc. v. United States, 480 F.3d 621, 624. The court concludes that this case "involves the same claim—or nucleus of operative fact" of those prior lawsuits. Waldman, 207 F.3d at 108 (2d Cir. 2000).

Even assuming that this is an "independent action" to challenge the validity of the court's earlier judgment, Everson fails to state facts that satisfy the rule 60(b) standard articulated in Campaniello Imports Ltd. V. Saporiti Italia, S.p.A., 117 F.3d 665 (2d Cir. 1997). He has failed to provide any facts to support the existence of fraud or a sufficient "mistake" to warrant the equitable relief he seeks. Although he

disagrees with the court's underlying decision in the first-filed lawsuit, he has failed to provide sufficient facts to support a conclusion that the decision was a mistake or the result of fraud. With respect to his argument that the court should have considered "comparators" in its prior decision, Everson has failed to provide sufficient facts that such an argument could not have been raised in the prior litigation.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss (document no. 10) is granted. The plaintiff's motions for extension of time (document no. 13) and to appoint a special process server (document no 15) are denied.

The clerk is hereby directed to render judgment in favor of the defendants and close this case.

It is so ordered this 30th day of November 2020, at Hartford, Connecticut.

/s/
Alfred V. Covello
United States District Judge

Appendix C

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 2nd day of June, two thousand twenty-one.

Christopher Daniel Everson.,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

ORDER

Docket No: 21-17

Appellant, Christopher Daniel 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

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

~~Appendix B~~

Appendix D

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CHRISTOPHER EVERSON

v.

THERESA LANTZ, JOHN ARMSTRONG, NELVIN LEVESTER and ROBERT CARBONE

CIVIL NO. 3:04CV387(RNC)

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

Appendix E

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

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[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.

Appendix F

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

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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

~~ADDENDUM~~ Appendix A

DIST OF CONN. (N.H.)
04-CV-387
CHAT16NY

Appendix G

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,

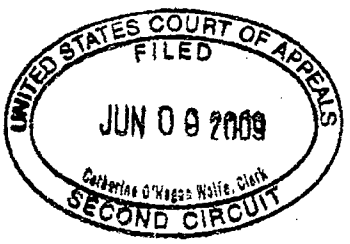
Christopher Everson,

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 H

~~ADDENDUM~~ ~~A-4~~ ~~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. Janet 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 C.T., 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
(requests 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:
O

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

8-12-09

Appendix I

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

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

Appendix J

UNITED STATES DISTRICT COURT ADDENDUM

DISTRICT OF CONNECTICUT EXHIBIT A-1

CHRISTOPHER EVERSON,

Plaintiff,

V.

SCOTT SEMPLE, *Commissioner of Correction, Official and Individual Capacity,* and JOHN ARMSTRONG, *Official and Individual Capacity,*

Defendants.

CASE NO. 3:16CV77 (RNC)

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

Appendix J

ADDENDUM EXHIBIT J-1

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)

Appendix K

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