No._____

OCTOBER TERM 2022

IN THE

SUPREME COURT OF THE UNITED STATES

Wamel Allah Petitioner,

Vs.

Kenneth Perlman, Et. Al.,

Respondents.

==========

ON PETITION FOR WRIT OF CERTIORARI
FOR UNITED STATES COURT OF APPEALS
FROM THE SECOND CIRCUIT

==========

TO: THE HONORABLE JUSTICES OF UNITED STATES SUPREME COURT

APPENDIX FOR:

Petitioner Wamel Allah #77B-0684
Adirondack Correctional Facility
P.O. Box 110
196 Raybrook Road
Raybrook, New York 12977

PS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WAMEL ALLAH,

Plaintiff,

-v-

KENNETH PERLMAN, et al.,

Defendants.

DECISION AND ORDER

16-CV-6596 EAW

Appendix "A"

INTRODUCTION

Before the Court is the Amended Complaint of *pro se* ("Plaintiff"), an inmate currently confined at the Gouverneur Correctional Facility. (Dkt. 14). By prior order dated August 22, 2017 (Dkt. 13) (the "August 22nd Order"), the Court granted Plaintiff permission to proceed *in forma pauperis* and found that all of his causes of action were subject to dismissal under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(a) (*id.* at 2). Plaintiff was afforded an opportunity to file an amended complaint as to his equal protection and First Amendment retaliation causes of action only. (*Id.* at 17).

Plaintiff filed his Amended Complaint on September 5, 2017. (Dkt. 14). The Court has reviewed the Amended Complaint and, for the reasons discussed below, concludes that Plaintiff's First Amendment retaliation claim may proceed to service as to Defendants J. Woodworth, L. Adams, L. LaTona, and Prack. All other claims set forth in the Amended Complaint are dismissed with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A.

DISCUSSION

I. Legal Standard

Sections 1915(e)(2)(B) and 1915A(a) of 28 U.S.C. require the Court to conduct an initial screening of this Complaint. Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). The Court shall dismiss a complaint in a civil action in which a prisoner seeks redress from a governmental entity, or an officer or employee of a governmental entity, if the Court determines that the action (1) fails to state a claim upon which relief may be granted or (2) seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1)-(2). Generally, the Court will afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639 (internal quotation marks omitted). However, leave to amend pleadings may be denied when any amendment would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

In evaluating the Complaint, the Court must accept all factual allegations as true and must draw all inferences in Plaintiff's favor. *See Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003) (per curiam); *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999). "Specific facts are not necessary," and a plaintiff "need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks

and citation omitted)); *see also Boykin v. Keycorp*, 521 F.3d 202, 213 (2d Cir. 2008) ("even after *Twombly*, dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases."). Although "a court is obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations," *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004), even pleadings submitted *pro se* must meet the notice requirements of Rule 8 of the Federal Rules of Civil Procedure. *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004).

Plaintiff's claims in this action are asserted under 42 U.S.C. § 1983. "To state a valid claim under 42 U.S.C. § 1983, the plaintiff must allege that the challenged conduct (1) was attributable to a person acting under color of state law, and (2) deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Whalen v. County of Fulton*, 126 F.3d 400, 405 (2d Cir. 1997) (citing *Eagleston v. Guido*, 41 F.3d 865, 875-76 (2d Cir. 1994)). "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985)).

To establish liability against an official under § 1983, a plaintiff must allege that individual's personal involvement in the alleged constitutional violation; it is not enough to assert that the defendant is a link in the chain of command. *See McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Moreover, the theory of *respondeat superior* is not available in a § 1983 action. *See*

Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). A supervisory official can be found to be personally involved in an alleged constitutional violation in one of several ways:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873 (citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

II. Plaintiff's Claims

The factual background regarding Plaintiff's claims is set forth in detail in the August 22nd Order, familiarity with which is assumed for purposes of this Decision and Order. As necessary, the Court has summarized Plaintiff's new allegations in the Amended Complaint below.

A. Equal Protection

The Fourteenth Amendment's Equal Protection Clause mandates equal protection under the law. "Essential to that protection is the guarantee that similarly situated persons be treated equally." *Blake v. Fischer*, No. 09-CV-266 (DNH/DRH), 2010 WL 2522198, at *13 (N.D.N.Y. Mar. 5, 2010), *report and recommendation adopted*, No. 9:09-CV-266, 2010 WL 2521978 (N.D.N.Y. June 15, 2010) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)); *see also Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005) ("To prove a violation of the Equal Protection Clause . . . a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of

intentional or purposeful discrimination."). The Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or malicious or bad faith intent to injure a person.*'" *Bizzarro v. Miranda,* 394 F.3d 82, 86 (2d Cir. 2005) (emphasis in original) (quoting *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir. 1980)).

Plaintiff's original Complaint asserted an equal protection claim largely premised on Plaintiff's belief that his 2008 referral to the New York State Department of Corrections and Community Supervision's ("DOCCS") Sex Offender Counseling and Treatment Program (the "SOCTP") by Defendants was improper because his criminal convictions did not involve sexual offenses. (*See* Dkt. 13 at 3). In the Amended Complaint, Plaintiff abandons that premise and, in a wholly conclusory fashion, alleges only that he was "treated differently than others similarly situated as a result of the defendant[s'] intentional and purposeful discrimination because of his race . . . by referring plaintiff to the (SOCTP)." (Dkt. 14 at 1).

The Court finds that this claim is again devoid of facts and non-conclusory allegations suggesting that Plaintiff was treated differently than other similarly situated inmates. *See Harrison v. Fischer,* No. 08-CV-1327 (NAM/DRH), 2010 WL 2653629, at *9 (N.D.N.Y. June 7, 2010) ("[Plaintiff] has failed to establish how he was treated differently than other inmates in [Alcohol and Substance Abuse Treatment Program]"). The Amended Complaint offers only Plaintiff's conclusion that he was referred to SOCTP

on the basis of his race, without any allegations to support that conclusion. Further, Plaintiff has failed to allege that "he [was] treated differently from other similarly situated individuals without any rational basis." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 158-59 (2d Cir. 2006). Accordingly, the Court finds that Plaintiff's Amended Complaint fails to state an equal protection claim. Because Plaintiff has already been afforded the opportunity to amend his Complaint, his equal protection claims are dismissed with prejudice.

B. Retaliation

Prisoners have a First Amendment right to access the courts and redress grievances, and prison officials cannot retaliate against a prisoner for exercising that right. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995). "[T]o sustain a First Amendment retaliation claim, a prisoner must demonstrate the following: '(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.'" *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004) (quoting *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir. 2001)). As to the third prong, a prisoner alleging retaliation must show that the protected conduct was "a substantial or motivating factor" behind the alleged retaliatory conduct. *See Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996). Evidence that can lead to an inference of improper motive includes: (1) the temporal proximity of the filing of a grievance and the alleged retaliatory act; (2) the inmate's prior good disciplinary record; (3) vindication at a hearing on the matter; and (4) statements by the defendant regarding his motive for disciplining plaintiff. *See Colon*, 58 F.3d at 872-73.

Plaintiff's First Amendment retaliation claim alleges that he was initially referred to the SOCTP in 2008, in retaliation for reaching a settlement agreement in a § 1983 action that he had filed with this Court in 2005. (Dkt. 14 at 2). He asserts that he had never been recommended for sexual offender treatment until "a couple of months" after settling his case. (*Id.*). Plaintiff further alleges that when he refused to admit to being a sex offender during a SOCTP session in May 2012, he was threatened with special housing unit confinement ("SHU") and received two false, retaliatory misbehavior reports written by three Defendants, Sex Offender Counselors J. Woodworth and L. Adams[1] and Sex Offender Senior Counselor L. LaTona. (*Id.* at 3-4). He allegedly received three months of SHU confinement as a result of the misbehavior reports. (*Id.* at 4). Defendant Prack, Director of Special Housing, affirmed the disciplinary disposition in July 2012. (*Id.*).

The Court finds that the Amended Complaint is devoid of allegations that Plaintiff was referred to the SOCTP in retaliation for protected conduct. The pleadings, taken as true, assert that an initial recommendation was made by "Correctional Counselor" Ken Donley in 2008. (*Id.* at 2). Plaintiff alleges that Donley, referring to Plaintiff's 2005 lawsuit, made the following statements to him:

> No matter how much money this case is settled for[,] we know . . . that you did in fact commit[] the acts in the misbehavior report written by the female counselor. You will not get away with this and we are going to make sure you are referred to the sex-offender program. We also know during an attempted burglary when you were a juvenile delinquent[,] you threat[ened] to rape a woman. You got away with that. But you will not get away with this. In that case[,] the court gave you a youthful offender y/o. We have those court records.

[1] L. Adams was not included as a defendant in the original Complaint but is identified as a defendant in the Amended Complaint. (Dkt. 14 at 1).

(*Id.*). Contrary to Plaintiff's contention that he was referred to sex offender treatment in retaliation for his prior civil rights action, these statements establish that his initial SOCTP referral was based on Defendants' beliefs regarding Plaintiff's own conduct and were not fabricated by Defendants in retaliation for his prior action or settlement agreement.

However, turning to Plaintiff's alleged refusal to admit that he was a sex offender during an SOCTP session, the Court finds that Plaintiff's First Amendment retaliation claim as to Defendants Woodworth, Adams, LaTona, and Prack may proceed to service. As the Second Circuit recently explained, "an individual holds 'a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false,'" and there is "no basis to circumscribe this right in the prison context" because "[n]o legitimate penological objective is served by forcing an inmate to provide false information." *Burns v. Martuscello*, 890 F.3d 77, 89 (2d Cir. 2018) (quoting *Jackler v. Byrne*, 658 F.3d 225, 241 (2d Cir. 2011)). As such, "it is eminently clear . . . that the First Amendment protects an inmate's right to refuse to provide false information to prison officials." *Id.*

Accordingly, accepting as true Plaintiff's allegation that he refused to falsely admit to being a sex offender, he engaged in protected activity. Plaintiff has also alleged adverse actions (the filing of false misbehavior reports) and retaliatory motive (that the false misbehavior reports were filed specifically because he would not falsely admit to being a sex offender). These allegations are sufficient to permit Plaintiff's First Amendment retaliation claims to proceed to service as to Defendants Woodworth, Adams, and LaTona.

With respect to Defendant Prack, Plaintiff alleges that he affirmed the disciplinary hearing that resulted from the false misbehavior reports. (Dkt. 14 at 4). "[C]ourts within the Second Circuit are split over whether . . . an allegation [that a defendant affirmed a disciplinary proceeding] is sufficient to establish personal liability for supervisory officials." *Samuels v. Fischer*, 168 F. Supp. 3d 625, 643 (S.D.N.Y. 2016) (quotation omitted and alteration in original) (collecting cases). However, several courts have found that "an affirmance of an unconstitutional disciplinary proceeding can be sufficient to find personal involvement." *Id.* In light of the conflict in the case law, the Court finds it appropriate to permit Plaintiff's claims against Defendant Prack to proceed to service at this time. *See Gathers v. Agents*, No. 10-CV-0475SR, 2010 WL 11488860, at *1 (W.D.N.Y. Nov. 9, 2010) (noting that authority in this Circuit is mixed "as to whether review and denial of a grievance constitutes personal involvement in the underlying allegedly unconstitutional conduct," and allowing claim to proceed to service on such a theory because "*[s]ua sponte* dismissal of a *pro se* complaint prior to service of process is a draconian device, which is warranted only when the complaint lacks an arguable basis in law or fact") (quotations omitted).

CONCLUSION

For the reasons discussed above, the Court finds that Plaintiff's First Amendment retaliation claim may proceed to service as to Defendants Woodworth, Adams, LaTona, and Prack. All other claims set forth in the Amended Complaint are dismissed with prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A.

ORDER

IT IS HEREBY ORDERED that Plaintiff's claims against Defendants Kenneth Perlman, Jeffery McKoy, L. Woodward, John Doe, Kerri Martin, S. Depree, and Joanne Nigro are dismissed with prejudice. The Clerk of Court is instructed to terminate these individuals as defendants in this action;

FURTHER, that the Clerk of Court is directed to cause the United States Marshal Service to serve copies of the Summons, Complaint and this Order upon Defendants L. LaTona, J. Woodworth, L. Adams, and Prack without Plaintiff's payment therefor, unpaid fees to be recoverable if this action terminates by monetary award in Plaintiff's favor;

FURTHER, the Clerk of Court is directed to forward a copy of this Order and Docket Nos. 1, 13, and 14 by email to Ted O'Brien, Assistant Attorney General in Charge, Rochester Regional Office <Ted.O'Brien@ag.ny.gov>;

FURTHER, that pursuant to 42 U.S.C. § 1997e(g), Defendants L. LaTona, J. Woodworth, L. Adams, and Prack are directed to respond to the Complaint.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: November 15, 2018
Rochester, New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------X

WAMEL ALLAH #77B-0684;

Plaintiff,

-against-

PERLMAN, Et. Al.,

Defendants.

----------X

DOCKET CASE #16-CV-6596(EAW)

ISSUES AS TO GENUINE MATERIAL FACTS
WHICH REQUIRES A TRIAL BY JURY

The Plaintiff respectfully assert[s] genuine issues of material facts exists which requires a trial by jury: 1) Was the Plaintiff instant criminal offenses as articulated in his Second Amended Complaint pending before the Court, required the Plaintiff to admitted he was a sex offender; 2) Was the Defendants required to give the Plaintiff a hearing to challenge the discretionary designation, as required by Due Process; 3) Was the Plaintiff already penalized (via) disciplinary action which resulted in (SHU) confinement for sex offenses dated August 9, 2006, and for lewd conduct dated March 28, 1996, and stalking offense dated October 6, 2008; and 4) for the false retaliatory misbehavior reports filed by Defendant J. Woodwooth and Defendant L. Latona and falsely endorsed by Defendant L. Adams a/k/a K. Adams social-worker; 5) Dose

Appendix "B"

[DOCCS] Disciplinary Rules Book General Policy on "Discipline of Inmates Disciplinary Action must never be arbitrary or capricious, or administered for the purpose of retaliation or revenge applies to the Defendants; and could a jury find the filing of the false misbehavior reports by the Defendants was an breached of [DOCCS] rules and regulations, and does this regulations applies to all [DOCCS] employees. [Emphasis added & applied].1/

THE GENUINE FACTS IN DISPUTED WHICH WARRANTS AND REQUIRES A TRIAL By JURY

The Plaintiff raised his retaliation claims in his Tier 3 Administrative Appeal, and before the Hearing Officer and was not required to file, any grievance complaints, for the following reasons: a) The ("Prison Litigation Reform Act") does not apply to the Disciplinary Administrative Appeal process; b) And, according to [DOCCS] Directive #4040 issues relevant to any Disciplinary Administrative Tier 3 Appeals are never grievable; c) Because the ("PLRA") did not require Plaintiff to file a grievance complaint, which only applies to prisoners complaints relative to prison conditions, and not the Administrative Disciplinary Appeal process. (See e.g., Luis Ramos v. Paul Cappius, Jr., Docket No. 15-CV-06600 (W.D.N.Y.2019)(Defeating Defendant's motion to dismiss on wrongfully confined to (SHU for 215 days based on a determination of guilt made at a Tier III hearing at which the

1/ Plaintiff declares under the penalties of perjury, the facts asserted on Pages (1-6) are deem to be true and correct, Title 28 U.S.C. § 1746.

hearing officer violated his right to call witnesses); (Barnes v. Paul Chappius, 2018 WL 4660390 (N.D.N.Y. Sept. 28, 2019)(Cross motion for summary judgment be granted in part and denied in part ... ("Plaintiff's First Amendment retaliation claims against two defendants be dismissed but that the remaining First Amendment claims against 10 other defendants process to trial.") [Emphasis added & applied] respectively. Hence, because the [State Defendants] conduct were violative of its owed rules and regulations which granted its inmates a protected liberty interest in remaining free from unlawful (SHU) and free from the filing of retaliatory false misbehavior reports this Honorable Court should find likewise* (See Williams v. Smith, 781 F.2d 319, 322 (2d Cir.1986); Zavaro v. Coughlin, 970 F.2d 1148, (2d Cir. 1992)("Requiring a modicum of evidence to support a decision ..., at disciplinary proceedings the court has explained, "will help to prevent arbitrary deprivations without threating institutional interests or imposing undue administrative burdens."); (see also, Zenon v. Downey, 2018 WL *6702851 (N.D.N.Y. Dec. 20, 2018); Palmer v. Richards, 364 F.3d 60, 65 (2d Cir.2004)).

As the Plaintiff do not relies on the First Amended Complaint, alone, but also on the ("Sworn Affidvait of Leah Mendslson Item #55 In Support of Plaintiff's Motion Practice"), Leah Mendelson a

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* See Chapters Five & Six Regulations Relative To Title 7 N.Y.C.R.R. Disciplinary proceeding must never be arbitrary and capricious or for retaliation and revenge.

Professional Advocate filed before this Honorable Court, on May 23, 2019 respectively)).

ADDITIONAL GENUINE FACTS IN DISPUTED THAT REQUIRES A TRIAL By JURY AS A MATTER OF FACT & FEDERAL CONSTITUTIONAL LAW

Defendants motion to dismiss is predicated upon distorted facts and fraudulent pleading[s] filed before this Honorable Court. (See Defendants Memorandum of Law id., at ¶2 Facts P.2, which articulated as follows: ... ("Per Plaintiff, the first misbehavior report pertained to the fact that on May 1, 2012, while incarcerated at Groveland Cf, he was issued a direct order not to contact social worker Adams instead to address any questions to Acting SOCR Linek ... He was issued a misbehavior report because on May 14, wrote a letter to to Ms. Adams, in violation of this order (Id.) She was fearful for her safety, as he had disregarded a direct order not to contact her, and had a history of stalking other female officers. (Id)." First, the Plaintiff respectfully assert[s] the Defendants L. Adams a/k/a K. Adams social-worker never wrote any misbehavior report[s], but only falsely endorsed the retaliatory misbehavior report written by the Defendant L. Latona. Secondly, the events as articulated by Defendants Memorandum of Law did not occurred at the Grovedland Correctional Facility. Third, the Defendant L. Latona wrote the misbehavior report at the Gowanda Correctional Facility, which was endorsed falsely by Defendant

L. Adams a/k/a K. Adams social-worker in retaliation at the Gowanda Correctional Facility respectively. Fourth, Defendant L. Adams never wrote the misbehavior report as these (discrepancies) appears in their motion practice a jury could find disbelieve. Fifth, Plaintiff call a inmate witness at the Tier 3 Hearing who testified in substance that the Plaintiff never caused any disturbance during the Community meeting, nor did Plaintiff refused any direct orders' and the witness stated from his observation during the Community meeting the Plaintiff did not at no time caused any harassment. Sixth, the defendants have the temerity to filed a motion to dimiss based upon false facts, and distortion of the events as they had occurred. Thus, Plaintiff further assert(s) there is a Federal Costitutional need for a discovery device which will elucidated and rectified the defendants (erroneous false conjectures), which are designed to have this Honorable Court dismiss the Plaintiff lawsuit without a trial by jury.

Moreover, Defendants motion practice constitutes a fraudulent activity before this Honorable Court. Thus their motion to dismiss should be denied with prejudice, and sanction be imposed because of the false facts and distortion as a matter of Federal Constitutional Law, pursuant to the Federal Rules of Civil Procedures, and all the laws theretofore.

Seventh, Defendants illegal sex offenders designation have impacted every Parole Broad hearing, and the Plaintiff relies on the

Transcripts submitted before this Honorable Court as Exhibits and evidence attached to the original complaint. Furthermore, a jury could find that the Defendants have violated Plaintiff rights to a fair hearing to challenge the sex offender stigmas, and that the Plaintiff have suffered from the defendants "misclassfication as a sex offender which resulted in "stigma plus," the possibility is of no particular assistance to [plaintiff] because he has not established a threshold requirement- the existence of a reputation-tarnishing statement that is false. (See Vega v. Lantz, 596 F.3d 77, 82 (2d Cir.2010), ... ("Thus, although "it continues to be the case that wrongly classifying an inmate as a sex offender may have a stigmatizing effect which implicates a constitutional liberty interest," id. at 81-82. Where, as here, the Plaintiff was never convicted of any sex offenses, in violation of New York Penal Law § 130.20(2), and a jury could find as well. [Emphasis added & applied]. Nor was there any physical sexual contact made. WHEREFORE, Defendants motion to dismiss Plaintiff's Civil (1983 Complaint) must be denied with prejudice, and Plaintiff's Cross Motion for Summary Judgment should be granted as a matter of Federal Constitutional Law, as it may be deem, just, and equitable.

DATED: September 18, 2020

TO: Hillel Deutsch,
Assistant Attorney General
144 Exchange Bvld, Suite 200
Rochester, N.Y. 14614

Respectfully submitted,

By: _____

Wamel Allah #77B-0684
Collins Correctional Facility
P.O. Box 340
Collins, N.Y. 14034

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------X

WAMEL ALLAH #77B-0684;

Plaintiff,

-against-

PERLMAN, Et. Al.,

Defendants.

----------X

DOCKET CASE #16-CV-6596(EAW)

PLAINTIFF'S SUPPORTING MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS

Wamel Allah #77B-0684/Plaintiff Pro se
Collins Correctional Facility
P.O. Box 340
Collins, New York 14034

Appendix "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------X

WAMEL ALLAH #77B-0684;

Plaintiff, DOCKET CASE #16-CV-6596(EAW)

-against-

PERLMAN, Et. Al.,

Defendants.

----------X

PRELIMINARY STATEMENT OF THE CASE

The Plaintiff Memorandum of Law, respectfully assert[s] Defendants motion to dismiss must be denied for all the reasons indicated in the Plaintiff's declaration and ("Statement of Issues") As To Genuine Material Facts Which Requires A Trial By Jury; & The Genuine Facts In Disputed Which Warrants & Requires A Trial By Jury id., at Pages "1" & "2" & Additional Genuine Facts In Disputed That Requires A Trial By Jury As A Matter of Fact & Federal Constitutional Law id., at Page "4" respectively.

Moreover, in retrospect the Supporting Sworn Affidavit of Leah Mendelson Item #55 submitted before this Honorable Court, requires that Defendants motion to dismiss must be denied.(See attached Sworn Affidavit of Leah Mendelson Item #55).

ARGUMENT & DISCUSSION

POINT ONE

WHETHER DEFENDANTS MOTION TO DISMISS PREDICATED UPON FALSE FACTS WHICH DISTORTED THE EVENTS AS THEY HAD OCCURRED VIOLATES FUNDAMENTAL FAIRNESS OF THE ADVERSARIAL PROCESS

DISCUSSION AND ANALYSIS

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c) "In reaching this determination, the court must assess whether there are any material factual issues to be tried while resolving and drawing reasonable inference against the moving party, and must give extra latitude to a pro se plaintiff." See Thomas v. Irvin, 981 F. Supp. 794, 798 (W.D.N.Y.1997)(internal citations omitted).

A fact is "material" only if it has some effect on the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S.242, 248 (1986); see Catanzaro v. Weiden, 140 F.3d 91, 93 (2d Cir.1998). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S.at 248; see Byrant v. Maffucci, 923 F.2d 979 (2d Cir.), cert. denied, 502 U.S. 849 (1991).

Once the moving party has met its burden of "demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with enough evidence to support a jury verdict in favor, and the motion will not be defeated merely upon a 'metaphisical doubt' concerning the facts, or on the basis of conjecture or surmise." Byrant, 923 F.2d at 982 (internal citations omitted). A Party seeking to defect a motion for summary judgment,

> must do more than make broad factual allegations and invoke the appropriate statute. The [party] must also show, by affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure, that there are specific factual issues that can only be resolved at trial.

See Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir.1995).

Discretionary Sex Offender Status

The individual conditions which Plaintiff challenges are a direct consequence of the determination to categorize Plaintiff as a discretionary sex offender, without providing the Plaintiff a hearing. "According to New York State Parole Handbook, '[a] discretionary sex offender is generally a person who has a history of sexual offense or pattern of inappropriate sexual behavior, but is not subject to Sex Offender Registry for any number of reasons." Webster v. Himmelbach, 271 F. Supp.3d 458, 462, n.1 (W.D.N.Y. 2017) (internal quotations omitted). NYSDOOS Directive #8304, which "sets forth departmental policy to identify and provide intensive

supervision strategies to both individuals subject to the New York State Sex Offender Registry and individuals with a history of sexually inappropriate behaviors so that the interest of public safety and supervision needs of the releasees are served," defines a discretionary sex offender as "[a]n offender found upon case review and determination ... to meet Department established criteria for specialized supervision as a sex offnder." Gordon v. LaClair, 48 Misc.3d 929 (S.Ct. Franklin Cty 2015). That criteria includes individuals with a current or prior crime of conviction that is sexually motivated offense, but not an but not an offense included in the New York State Sex Offender Registry, where "[i]t appears that the offender and/or community would benefit from intensive supervision practices that incorporate specialized sex offender 'containment' strategies." Id. Where, as here, there was never any physical sexual conduct with any of [DOCCS] female employees as Defendants Memorandum of Law id., at Page "2" & "3" respectively.

Furthermore, the Defendants also falsely accused the Plaintiff of making threats in a loud voice at the "Community Meeting" Facilitator by Defendant J. Woodworth, however, no where in the retaliatory false misbehavior report was this mentioned. As noted by the First Amended Complaint the Plaintiff was removed from the Sex Offender Group Meeting because he refused to admitted he was a sex offender. Thereafter the Plaintiff was escorted to (SHU) based upon the two false retaliatory misbehavior report[s] author

by Defendant J. Woodworth and Defendant L. Latona, and falsely endorsed by Defendant L. Adams a/k/a K. Adams social worker.

Lastly, because Defendants presented false information in their motion to dismiss their motion for summary judgment should be denied with prejudice, with sanctions as it may be appropriated to this Honorable Court. (See Defendants Exhibit "C" which reflects Defendant J. Woodworth & Defendant L. Latona wrote reports).

Personal Involvement

Defendants motion to dismiss concedes as follows: ... ("At a subsequent combined disciplinary hearing he was found guilty for both incidents, and sentenced to 3 months SHU. The determination was upheld after review by Director Prack. Plaintiff does not allege any Due Process violations at the hearing, but alleges the misbehavior reports and the upholding of the guilty determination were retaliatory for his prior refusal to admit he was a sex offender.").

It is well settled that the personal involvement of defendants in an alleged constitutional deprivation is a prerequisite to an award of damages under § 1983 Gason v. Coughlin, 249 F.3d 156, 164 (2d Cir.2001); Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995); Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060, 1065 (2d Cir.1989)). In the instant case, (SHU) Director Prack affirmed the Plaintiff Administrative Disciplinary Appeal, inter alia. This

is sufficient to establish (SHU) Director Prack's personal involvement respectively. See e.g., Burke, 449 F.3d 470, 484 (2d Cir.2006) (enforcement of special condition of parole constitutes personal involvement). As a result, the Defendants motion must be dismiss with prejudice.

WHEREFORE, Plaintiff prays for the relief sought as a matter of Federal Constitutional Law.

DATED: September 18, 2020
Collins, N.Y.

TO: Hillel Deutsch
Assistant Attorney General
144 Exchange Bvld, Suite 200
Rochester, N.Y 14614

Respectfully submitted,

By: _____

Wamel Allah #77B-0684/Plaintiff
Collins Correctional Facility,
P.O. Box 340
Collins, N.Y. 14034

PROOF OF SERVICES

Plaintiff WAMEL ALLAH, declares under the penalties of perjury, and pursuant to the laws of United States of America, that the following is true and correct: That on the herein date as listed below I have served upon the Defendants counsel Plaintiff's Declaration and Cross-Motion for Summary Judgment with my memorandum of law and sworn affidavit of Leah Mendelson Item #55 respectively at the below address:

1. Hillel Deutsch
   Assistant Attorney General
   144 Exchange Bvld, Suite 200
   Rochester, N.Y. 14614

   Clerk's Office
2. United States District Court
   Western District of New York
   2120 United States Courthouse
   100 State Street,
   Rochester, N.Y. 14614

I, declare under the penalties of perjury, pursuant to Title 28 U.S.C. § 1746, that the following is true and correct.

Respectfully submitted,

By: _____

Wamel Allah #77B-0684
Collins Correctional Facility,
P.O. Box 340
Collins, N.Y. 14034

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

----------X

WAMEL ALLAH #77B-0684,
PLAINTIFF,

-against-

L. LATONA, J. WOODWORTH,
L. ADAMS, Director of (SHU) PRACK,

DEFENDANTS.

----------X

AFFIDAVIT IN SUPPORT OF
PLAINTIFF'S MOTION PRACTICE

CASE DOCKET #16-CV-6596 (EW)

Appendix "B"

STATE OF NEW YORK)
COUNTRY OF KINGS) SS.:

Leah Mendelson, being duly sworn, deposes and says:

1. I am a professional advocate for The Parole Preparation Project of The National Lawyers Guild, and I am employed as a community engagement specialist with The Future Project, a youth development nonprofit that works with student to help them achieve their goals.
2. In October of 2018 I cooperated in a joint effort with two other advocates of The Parole Preparation Project to compose an advocacy letter to Wamel Allah DIN#77B-0684, who at the time was at the Clinton Correctional Facility.
3. On or about April-June 2018 myself and my two co-advocates each maintained regular contact with Mr. Allah. A portion of our correspondence focused on sexual harassment and society's evolving understanding of appropriate behavior and gender-based power dynamics. Throughout this time period, myself and my co-advocates shared with Mr. Allah via mail a wide array of articles on the topic. We each would regularly have conversations with Mr. Allah during which we would discuss his reactions to and learnings from these materials via phone and in person at advocacy visits at the Gouverneur Correctional Facility. Throughout my time knowing Mr. Allah, he has maintained an open and eager willingness to not only learn more about what constitutes sexual harassment, but to also learn how to be an appropriate and supportive ally to people who experience sexual harassment.
4. I have been impressed with Mr. Allah's learnings and his ability to articulate his past mistakes, his current views, his desire to support people who experience sexual harassment, and to support efforts to prevent sexual harassment and sexual violence.
5. During these discussions and visits Mr. Allah has exhibited a learning mindset and maintains appropriate, amicable behavior.
6. I am aware that prison officials wanted Mr. Allah to enroll in the sex-offenders program, and that he has refused to participate in the sex-offenders program.
7. I have also read the Parole Hearing transcripts dated June 27, 2018 where Mr. Allah informed the Parole Board that the stigmas of being associated with the sex offenders would put his life in jeopardy and isolate him. From what Mr. Allah has revealed to me, these sex offender stigmas have had a negative impact on the outcome of parole decision denying his parole applications.

8. Additionally, Mr. Allah has achieved a great deal of higher education and vocational skills towards reentry respectively. See MR Allah's resume attached.
9. I will be willing to testify as a witness before this Honorable Court for Mr. Wamel Allah.

Sworn to before me this 16th day of May, 2019

Notary Public

CAMILE TAYLOR
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01TA6137717
Qualified In Nassau County
Commission Expires January 8, 2022

Respectfully submitted,

Leah Mendelson, Advocate
Brooklyn, New York
(901) 734-3326

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WAMEL ALLAH #77B-0684;	
Plaintiff,	PLAINTIFF'S THIRD DECLARATION IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURES AS A MATTER OF LAW
-against-	
PERLMAN, Et. Al.,	
Defendants.	DOCKET CASE #16-CV-6596(EAW)

Plaintiff WAMEL ALLAH, declares under the penalties of perjury, pursuant to the laws of United States of America Title 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Plaintiff in the above entitled caption.

2. This Third Declaration is duly submitted in support of the Plaintiff's motion practice, and "Cross-Motion" for summary judgment, and as a request from this Honorable to enjoined Defendant[s] by and issued an Order to expunged the Sex-Offender recommendations from the Plaintiff's institutional records. See the Plaintiff's Memorandum of Law in Support of Third Declaration.

3. As This Honorable Court ("Decision & Order") dated September 21, 2020 indicated the Plaintiff/Response is due by October 16, 2020 respectively. Moreover, the Plaintiff hereby respectfully

request[s] this Honorable Court issued an expedited ("Decision & Order") on the motions respectively.

WHEREFORE, the Plaintiff prays for the relief sought as it may be deem, just, and equitable to this Honorable Court, as a matter of Federal Constitutional Law.

DATED: October 11, 2020

TO: Hillel Deutsch
Assistant Attorney General
144 Exchange Blvd, Suite 200
Rochester, New York 14614

I, declare under the penalties of perjury, pursuant to the laws of United States of America Title 28 U.S.C. § 1746 that my motion practice and Third Declaration is true and correct.

Respectfully submitted,

By: _____

Wamel Allah #77B-0684/Plaintiff/Pro se
Collins Correctional Facility,
P.O. Box 340
Colins, New York 14034

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WAMEL ALLAH #77B-0684;

Plaintiff,

-against-

PERLMAN, Et. Al.,

Defendants.

DOCKET CASE #16-CV-6596(EAW)

==========

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF THIRD DECLARATION AND CROSS-MOTION FOR SUMMARY-JUDGMENT AS A MATTER OF FEDERAL LAW

==========

Wamel Allah #77B-0684/Plaintiff/Pro se
Collins Correctional Facility
P.O. Box 340
Collins, New York 14034

Appendix "B"

ARGUMENT & DISCUSSION

POINT ONE

THE DEFENDANTS SEX-OFFENDER STIGMAS HAVE CAUSED ADVERSE NEGATIVE CONSEQUENCES AND HAVE IMPACTED PAROLE CONDITIONS AND PAROLE RELEASES & PAROLE BOARDS RESPECTIVELY IN VIOLATION OF FEDERAL LAW

As the Plaintiff's motion practice has delineated the defendants unlawful "sex-offender designation there is no need to expressed the ramifications of the defendant[s] reckless conduct and their acts/deprivations which demonstrated they have penalized the Plaintiff for his refusal to admitted he is a ("Sex-Offender"). See generally, McKune v. Lile, 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.E.2d 42 (2002)(Calling "[S]ex offenders ... a serious threat in this nation."); see also Coleman v. Dretke, 409 F.3d 665, 668 (5th Cir.2005)(Percuriam)(concluding that "by requiring [inmate] to attend sex offender therapy, the state labeled him a sex offender a label which strongly implies that [the plaintiff] has been convicted of a sex offense and which can undoubtedly cause adverse social consequences)(internal citations and quotation marks omitted); See Neal v. Shimoda 131 F.3d 818, 829 (9th Cir.1997) ... ("We can hardly conceive of a state's action bearing moor 'stigmatizing consequences than the labeling of a prison inmate as a sex offender"); Chambers v. Colorado Dep't of Corr. 205 F.3d 1237, 1242

1244 (10th Cir.2000)(concluding that the sex offender label is "replete with inchoate stigmatization" and enjoining Colorado from withholding earned time credit to a inmate who refused to admit to being a sex offender."))* [Emphasis applied].(See also STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION PAROLE BOARD REPORT & ORC RECOMMENDED SPECIAL CONDITIONS Page 1 of 3 [X] SC12- "I will participate in Sex Offender Counseling Treatment, as directed by the PAROLE OFFICER.") [Plaintiff's Exhibit "P" respectively.] (See Page "1" of Parole Board Report which also reflects Plaintiff's Crimes and Conviction Information Report made out by ("ORC K. MARTIN, & S. DUPREE, SORC November 25, 2016 & November 14, 2016 at Bear Hill Correctional Facility)).

Unequivocally, Plaintiff Cross-Motion for Summary-Judgment should be granted as a matter of Federal Constitutional Law.

DATED: October 11, 2020

TO: Hillel Deutsch
Assistant Attorney General
144 Exchange Blvd, Suite 200
Rochester, New York 14614

Respectfully submitted,

By: _____

Wamel Allah #77B-0684/Plaintiff
Collins Correctional Facility
P.O. Box 340
Colins, New York 14034

---

* The Defendants retaliated against the Plaintiff by having him placed in (SHU) because he refused to admit to being a sex offender.

PROOF OF SERVICES

Plaintiff WAMEL ALLAH, declares under the penalties of perjury, under the Laws of United States of America, pursuant to Title 28 U.S.C. § 1746, that on the herein date of services listed below I mailed my Third Declaration and Memorandum of Law with the Plaintiff's Exhibit "P" to the below listed parties:

1. United States District Court
   Western District of New York
   2120 United States Courthouse
   100 State Street
   Rochester, New York 14614

2. Hillel Deutsch
   Assistant Attorney General
   144 Exchange Blvd, Suite 200
   Rochester, New York 14614

October 11, 2020

Respectfully submitted,

By: _____

Wamel Allah #77B-0684/Plaintiff
Collins Correctional Facility,
P.O.Box 340
Collins, New York 14034

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WAMEL ALLAH,

Plaintiff,

v.

L. ADAMS,

Defendant.

DECISION AND ORDER

6:16-CV-06596 EAW

INTRODUCTION

Pro se plaintiff Wamel Allah ("Plaintiff"), an inmate at Adirondack Correctional Facility, filed this action seeking relief pursuant to 42 U.S.C. § 1983. (Dkt. 1). The Court previously screened Plaintiff's complaint under the 28 U.S.C. §§ 1915(e)(2)(B) and 1915A criteria and concluded that the complaint was subject to dismissal, but granted Plaintiff leave to replead his claims. (Dkt. 13). Plaintiff filed an amended complaint (Dkt. 14), which the Court screened with respect to the §§ 1915(e)(2)(B) and 1915A criteria and permitted Plaintiff's First Amendment retaliation claim as asserted against defendants J. Woodworth, L. Latona, Special Housing Unit Director Prack, and L. Adams to proceed to service (Dkt. 19). Plaintiff alleges that he was retaliated against in violation of the First Amendment because he refused to admit that he was a sex offender during a Sex Offender Counseling and Treatment Program ("SOCTP"), and as a result he was threatened with SHU (special housing unit) and received two false, retaliatory misbehavior reports, for which he received three months of SHU confinement. (Dkt. 14 at 3-4).

Appendix "D"

On May 18, 2021, the Court granted summary judgment to defendants Woodworth, Latona, and Prack, because Plaintiff had failed to exhaust his administrative remedies. (Dkt. 116 (the "May 18, 2021 Decision and Order")). Presently before the Court is a motion to dismiss filed by defendant L. Adams ("Defendant" or "Adams") (Dkt. 117), as well as Plaintiff's motion to vacate the May 18, 2021 Decision and Order (Dkt. 125).[1] The Court issued scheduling orders on both motions (Dkt. 118; Dkt. 127), and received further submissions from the parties (Dkt. 126; Dkt. 130; Dkt. 131; Dkt. 132; Dkt. 133). For the following reasons, Defendant's motion to dismiss (Dkt. 117) is granted, and Plaintiff's motion to vacate (Dkt. 125) is denied.

BACKGROUND

The following facts are taken from the amended complaint. As required on a motion to dismiss, the Court treats Plaintiff's factual allegations as true.

The alleged retaliation occurred in May 2012, when Plaintiff was participating in SOCTP. (*See* Dkt. 14 at 3). Plaintiff alleges that in May 2012 he refused to admit that he was a sex offender during SOCTP, and thereafter defendant Woodworth removed him from the group and escorted him to SHU. (*Id.*). Plaintiff also received two misbehavior reports, which he alleges were fabricated by defendants Woodworth and Latona, and endorsed by defendant Adams. (*Id.*). As a result of the fabricated misbehavior reports, Plaintiff was

[1] Plaintiff has filed a Notice of Interlocutory Appeal of the May 18, 2021 Decision and Order. (Dkt. 120; Dkt. 137). Because "the pendency of an appeal does not divest a district court of jurisdiction over [a] motion for reconsideration," the Court may entertain Plaintiff's motion for reconsideration of the May 18, 2021 Decision and Order. *Malcolm v. Honeoye Falls-Lima Cent. Sch. Dist.*, 757 F. Supp. 2d 256, 258 (W.D.N.Y. 2010).

confined in SHU for three months. (*Id.* at 4). Defendant Prack reviewed Plaintiff's appeal of the disciplinary hearing and affirmed the decision of the hearing officer. (*Id.*).

DISCUSSION

I. Defendant's Motion to Dismiss

A. Legal Standard

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). A court should consider the motion by "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). To withstand dismissal, a plaintiff must set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). "To state a plausible claim, the complaint's '[f]actual

allegations must be enough to raise a right to relief above the speculative level.'" *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 218 (2d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555). While the Court is "obliged to construe [*pro se*] pleadings liberally, particularly when they allege civil rights violations," *McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004), even pleadings submitted *pro se* must satisfy the plausibility standard set forth in *Iqbal* and *Twombly*, *see Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) ("Even after *Twombly*, though, we remain obligated to construe a *pro se* complaint liberally.").

B. Administrative Exhaustion

Pursuant to the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

> To satisfy that requirement, prisoners in New York must ordinarily follow a three-step DOCS grievance process. The first step in that process is the filing of a grievance with the Inmate Grievance Resolution Committee. Next, the inmate may appeal an adverse decision to the prison superintendent. Finally, the inmate may appeal the superintendent's decision to the Central Office Review Committee ("CORC"). In general, it is only upon completion of all three levels of review that a prisoner may seek relief in federal court under § 1983.

Crenshaw, 686 F. Supp. 2d at 236 (citations omitted). "Exhaustion is mandatory—unexhausted claims may not be pursued in federal court." *Amador v. Andrews*, 655 F.3d 89, 96 (2d Cir. 2011); *see also Ross v. Blake*, ___U.S.___, 136 S. Ct. 1850, 1857 (2016) ("mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion."). "[D]efendants bear the burden of proof and prisoner

plaintiffs need not plead exhaustion with particularity." *McCoy v. Goord*, 255 F. Supp. 2d 233, 248 (S.D.N.Y. 2003).

In support of his motion to dismiss, Defendant contends that he did not join in the previously-filed motion for summary judgment filed on behalf of his co-defendants Woodworth, Prack, and Latona, because he was not served with Plaintiff's amended complaint at that time.[2] (Dkt. 117-1 at 1). He cites to the May 18, 2021 Decision and Order, where the Court found that Plaintiff "did not exhaust any grievances in 2012, when the incidents alleged in the amended complaint occurred," and that Plaintiff also failed to provide any cognizable excuse for his failure to exhaust. (*Id.* at 2-3; *see also* Dkt. 116). Defendant argues that he is entitled to dismissal based on the Court's determination that Plaintiff failed to exhaust his administrative remedies. (Dkt. 117-1 at 2-3). In response, Plaintiff contends that he was not required to exhaust his administrative remedies because the PLRA applies only to prison conditions and not to individual acts or claims of retaliation (Dkt. 126 at 5), and he also disputes Defendant's arguments pertaining to exhaustion (*id.* at 8 (disputing that Defendant is entitled to dismissal because the law does not require him to exhaust his administrative remedies via the grievance process)).

In the May 18, 2021 Decision and Order, the Court cited to evidence submitted by defendants Woodworth, Latona, and Prack in support of their motion for summary judgment, including a two-page Department of Corrections and Community Supervision

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[2] Although the summons for defendant Adams was returned unexecuted (*see* Dkt. 119), on May 20, 2021, his attorney filed the instant motion to dismiss on his behalf (Dkt. 117).

("DOCCS") document titled "Inmate Grievance, Closed Cases" for Plaintiff, which listed his exhausted grievance history. (Dkt. 116 at 6; *see also* Dkt. 101-3 at 5-6). As explained in the May 18, 2021 Decision and Order, while the grievance report revealed that Plaintiff filed grievances in 1988, 1989, 1994, 1995, 1996, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2009, 2014, and 2016, he did not exhaust any grievances in 2012, when the incidents alleged in the amended complaint occurred. (Dkt. 116 at 6-7). Because Plaintiff did not dispute these facts and offered no valid excuse for his failure to exhaust his claims, the Court granted summary judgment to defendants Woodworth, Latona, and Prack. (*Id.* at 11-12).

The Court is cognizant that "[m]ost circuits that have considered the issue, . . . including this circuit, have held that nonexhaustion is an affirmative defense, and that therefore defendants bear the burden of proof and prisoner plaintiffs need not plead exhaustion with particularity." *McCoy,* 255 F. Supp. 2d at 248. Accordingly, "[t]he only circumstance in which it is appropriate to dismiss a complaint on nonexhaustion grounds is when it is apparent from the face of the complaint that the plaintiff failed to exhaust his administrative remedies." *Randle v. Alexander,* 960 F. Supp. 2d 457, 483 (S.D.N.Y. 2013). However, the Court has already decided, in connection with the May 18, 2021 Decision and Order, that Plaintiff failed to exhaust his administrative remedies because he filed no grievances in 2012, when the incidents alleged in the amended complaint occurred (*see* Dkt. 116 at 6-7), and that determination is law of the case. Under the law of the case doctrine, "'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages of the same case' unless 'cogent and compelling

reasons militate otherwise.'" *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 27 F. Supp. 3d 447, 473 (S.D.N.Y. 2014) (quoting *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009)); *see also Musacchio v. United States*, 577 U.S. 237, 244-45 (2016) ("The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." (quotations and citations omitted)). *See, e.g., Lopez v. Goodman*, No. 14-CV-6518 CJS, 2019 WL 315324, at *2, 4-5 (W.D.N.Y. Jan. 24, 2019) (dismissing amended complaint based on the plaintiff's failure to exhaust, where the defendants argued that it was "law-of-the-case that the relevant administrative remedy, i.e., the Inmate Grievance Program, was 'available' to Plaintiff, and that it is undisputed that when Plaintiff finally filed a grievance several years after the fact, CORC found that the grievance was procedurally barred as untimely"); *see also MB by RRB v. Islip Sch. Dist.*, No. 14-cv-4670 (SJF)(GRB), 2017 WL 1325367, at *7 (E.D.N.Y. Mar. 31, 2017) (law of the case applied to court's prior determination that plaintiffs were required to exhaust their administrative remedies).

As a result, unless Plaintiff's motion to vacate is successful, he is barred from pursuing his claims against Adams for the same reasons set forth in the May 18, 2021 Decision and Order. Therefore, the Court will turn to Plaintiff's motion to vacate.

II. Plaintiff's Motion to Vacate

On June 17, 2021, Plaintiff filed a "motion to vacate" the May 18, 2021 Decision and Order, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, which governs motions to alter or amend a judgment. (Dkt. 125; Dkt. 131). Plaintiff contends that the May 18, 2021 Decision and Order violates controlling authority in the Second Circuit.

(Dkt. 125 at 3). Given Plaintiff's *pro se* status, the Court construes his motion as one for reconsideration.

"The standard for granting . . . a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Common grounds for reconsideration include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (citation omitted). "These criteria are strictly construed against the moving party so as to avoid repetitive arguments on issues that have been considered fully by the court." *Boyde v. Osborne*, No. 10-CV-6651, 2013 WL 6662862, at *1 (W.D.N.Y. Dec. 17, 2013) (quoting *Griffin Indus., Inc. v. Petrojam, Ltd.*, 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)). The decision to grant or deny a motion for reconsideration is within "the sound discretion of the district court. . . ." *Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009) (citation omitted).

The Court has before it evidence submitted by defense counsel in connection with the prior motion for summary judgment demonstrating that Plaintiff failed to exhaust any grievances in 2012. Plaintiff has had several opportunities to respond to the exhaustion argument, and in doing so has consistently failed to dispute that he failed to exhaust his claims, instead arguing that he was not required to do so. (*See* Dkt. 113 at 2 (not disputing failure to exhaust argument, but rather arguing that "a Tier '3' Disciplinary proceeding can

never be grievable," citing to DOCCS Directive #4040, § 701.3(e)); Dkt. 126 at 5 ("Plaintiff was not required to exhaust[] administrative remedies because the PLRA only applies to prison conditions and not to individual claims of retaliation")). Although with the present motion, Plaintiff argues that he "hereby now dispute[s]" the *argument* that Defendant is entitled to judgment in his favor because he failed to exhaust his claims (*see id.* at 8 (citing to his argument that he was not required to exhaust his administrative remedies via the grievance process)), Plaintiff has not, at any point, disputed the *fact* that he failed to exhaust his claims, *see, e.g., Tolliver v. N.Y.S. Dep't of Corr. Svcs.*, No. 08 Civ. 4561(DC), 2009 WL 618371, at *4 (S.D.N.Y. Mar. 12, 2009) (on motion to dismiss, finding that the plaintiff failed to exhaust his administrative remedies, noting that the plaintiff did not dispute that he failed to exhaust his administrative remedies, but rather argued that his complaint was not subject to exhaustion because it did not involve "prison conditions"); *see also Gottesfeld v. Anderson*, No. 18 Civ. 10836 (PGG), 2020 WL 1082590, at *7 (S.D.N.Y. Mar. 6, 2020) (discovery not necessary on the plaintiff's efforts to exhaust, as those facts were not in dispute).

In support of his argument that he was not required to exhaust his retaliation claims, Plaintiff cites to *Lawrence v. Goord*, 238 F.3d 182, 185-86 (2d Cir. 2001), where the court held that an inmate is not required to exhaust administrative remedies before bringing an action for individualized instances of retaliation. (*See* Dkt. 126 at 6). However, *Lawrence* was vacated by the United States Supreme Court and remanded for further consideration in light of *Porter v. Nussle*, 534 U.S. 516 (2002). *Goord v. Lawrence*, 535 U.S. 901 (2002). On remand, the Second Circuit held that the plaintiff was required to exhaust his retaliation

claim. *Lawrence v. Goord*, 304 F.3d 198, 200 (2d Cir. 2002) ("Taking *Nussle* as our guide, we now determine that Lawrence's retaliation claim fits within the category of 'inmate suits about prison life,' and therefore must be preceded by the exhaustion of state administrative remedies available to him.").

Plaintiff also cites *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), *Hemphill v. New York*, 380 F.3d 680 (2d Cir. 2004), and *Larkins v. Selsky*, No. 04Civ.5900RMB(DF), 2006 WL 3548959 (S.D.N.Y. Dec. 6, 2006). (Dkt. 125 at 1, 6-7). However, all of these decisions were issued prior to *Ross v. Blake*, 578 U.S. 632 (2016), where the Court held that an inmate's failure to exhaust administrative remedies prior to bringing suit under the PLRA may not be excused, even to take "special" circumstances into account, and thus the cases relied on by Plaintiff do not represent the current state of the law with respect to exhaustion. *See, e.g., Williams v. Correction Officer Priatno*, 829 F.3d 118, 123 (2d Cir. 2016) ("[T]o the extent that our special circumstances exception established in *Giano* . . . and *Hemphill* . . . permits plaintiffs to file a lawsuit in federal court without first exhausting administrative remedies that were, *in fact*, available to them, those aspects of *Giano* and *Hemphill* are abrogated by *Ross*. Indeed, *Ross* largely supplants our *Hemphill* inquiry by framing the exception issue entirely within the context of whether administrative remedies were actually available to the aggrieved inmate.").

In other words, none of the cases Plaintiff cites constitute controlling law the Court overlooked in the May 18, 2021 Decision and Order. Moreover, Plaintiff has cited to no evidence that would alter the Court's prior determination that he failed to exhaust his administrative remedies with respect to the alleged incidents in the amended complaint.

Again, Plaintiff does not dispute that he did not exhaust his remedies nor does he contend that he was unable to do so. Rather, as discussed in the May 18, 2021 Decision and Order, Plaintiff contends that he was not required to exhaust his administrative remedies, but the Court rejected that argument for the reasons previously articulated. Accordingly, Plaintiff has failed to meet the strict standard warranting reconsideration of the May 18, 2021 Decision and Order, and therefore his motion to vacate (Dkt. 125) is denied, and accordingly, the motion to dismiss filed by defendant Adams (Dkt. 117) must be granted because the fact that Plaintiff's claims are barred for failure to exhaust is the law of the case.[3]

[3] Generally, a dismissal for failure to exhaust under the PLRA is dismissed without prejudice, particularly when the dismissal is based on a curable, procedural flaw. However, because Plaintiff has since been transferred from the Gowanda Correctional Facility where he alleges the "acts of retaliation occurred" (*see* Dkt. 14 at 3), and he can no longer cure his defect, the Court dismisses Plaintiff's claim with prejudice. *See Hernandez v. Doe 1-7*, 416 F. Supp. 3d 163, 166 (E.D.N.Y. 2018) ("Where an inmate can no longer exhaust administrative remedies because he has been transferred, however, and had ample opportunity to exhaust prior to being transferred, but failed to do so, dismissal with prejudice is proper.").

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss (Dkt. 117) is granted, and Plaintiff's motion to vacate (Dkt. 125) is denied. Plaintiff's claims against defendant Adams are dismissed, and the Clerk of Court is directed to enter judgment in his favor and to close this case.

SO ORDERED.

ELIZABETH A. WOLFORD
Chief Judge
United States District Court

DATED: December 2, 2021
Rochester, New York

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 13th day of January, two thousand twenty-two.

Wamel Allah,

Plaintiff - Appellant,

v.

L. Latona, Sorc, J. Woodworth, Orc (SHU Director Prack), SHU Director Prack, L. Adams, Orc,

Defendants – Appellees.

ORDER

Docket No. 21-1367

Appendix "E"

Wamel Allah,

Plaintiff-Appellant,

v.

L. Adams, Orc,

Defendant-Appellee.

Docket No. 21-3026

IT IS ORDERED that the appeals docketed under 21-1367 and 21-3026 are hereby consolidated.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

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 10th day of January, two thousand twenty-two,

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Wamel Allah,

Plaintiff - Appellant,

v.

L. Latona, Sorc, J. Woodworth, Orc (SHU Director Prack), SHU Director Prack, L. Adams, Orc,

Defendants – Appellees.

ORDER

Docket No. 21-1367

Appendix "F"

Wamel Allah,

Plaintiff-Appellant,

v.

L. Adams, Orc,

Defendant-Appellee.

Docket No. 21-3026

Appellant, proceeding pro se, moves the Court to consider his affidavit dated December 27, 2021 and an appendix containing the Parole Board Release Decision Notice, in connection with the arguments set forth in his principal briefs.

IT IS HEREBY ORDERED that the motion is REFERRED to the panel that will determine the merits of the appeals.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

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 16th day of December, two thousand twenty-one,

Wamel Allah,

Plaintiff - Appellant,

v.

L. Latona, Sorc, J. Woodworth, Orc (SHU Director Prack), SHU Director Prack, L. Adams, Orc,

Defendants - Appellees,

Kenneth Perlman, Former Deputy Commissioner for Program Services, Jeffery McKoy, Deputy Commissioner for Program Services, L. Woodward, Former Senior Counselor, John Doe, Former Counselor, Kerri Martin, Orc, S. Depree, Sorc, Joanne Nigro, Director Office of Guidance and Counseling Albany, N.Y.,

Defendants.

ORDER
Docket No: 21-1367

Appendix "B"

Counsel for APPELLEE L. Adams, L. Latona, Prack and J. Woodworth has filed a scheduling notification pursuant to the Court's Local Rule 31.2, setting March 14, 2022 as the brief filing date.

It is HEREBY ORDERED that Appellee's brief must be filed on or before March 14, 2022.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

MANDATE

W.D.N.Y.
16-cv-6596
Wolford, C.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 16th day of June, two thousand twenty-two.

Present:

Debra Ann Livingston,
Chief Judge,
José A. Cabranes,
Michael H. Park,
Circuit Judges.

Appendix "H"

Wamel Allah,

Plaintiff-Appellant,

v.

21-1367 (L),
21-3026 (Con)

L. Latona, Sorc, et al.,

Defendants-Appellees,

Kenneth Perlman, Former Deputy Commissioner for Program Services, et al.,

Defendants.

Appellant, pro se, moves for leave to proceed in forma pauperis ("IFP"), appointment of counsel, and other relief. Appellees move to dismiss the appeal in 2d Cir. 21-1367. Upon due consideration, it is hereby ORDERED that the IFP motion is DENIED as unnecessary because the district court granted IFP status for appeal. *See* Fed. R. App. P. 24(a)(3). It is further ORDERED that the Appellees' motion to dismiss is DENIED because Appellant is appealing from a final order. *SongByrd, Inc. v. Est. of Grossman*, 206 F.3d 172, 178 (2d Cir. 2000). It is further ORDERED that the remaining motions are DENIED and both appeals are DISMISSED because they lack "an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see* 28 U.S.C. § 1915(e).

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

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

MANDATE ISSUED ON 08/10/2022

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 3rd day of August, two thousand twenty-two.

Wamel Allah,

Plaintiff - Appellant,

v.

L. Latona, Sorc, J. Woodworth, Orc (SHU Director Prack), SHU Director Prack, L. Adams, Orc,

Defendants - Appellees,

Kenneth Perlman, Former Deputy Commissioner for Program Services, Jeffery McKoy, Deputy Commissioner for Program Services, L. Woodward, Former Senior Counselor, John Doe, Former Counselor, Kerri Martin, Orc, S. Depree, Sorc, Joanne Nigro, Director Office of Guidance and Counseling Albany, N.Y.,

Defendants.

ORDER

Docket Nos: 21-1367 (L)
21-3026 (Con)

Appendix "I"

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

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

4. In addition, this Court's (Decision & Order) is erroneous as a matter of Federal Constitutional Law as articulated: ... ("It is further ORDERED that the remaining motions are DENIED and both appeals are DISMISSED because they lack "an arguable basis either in law or fact")(Citations omitted). The Plaintiff-Appellant assertion[s] heretofore are predicated upon this Honorable Court's (Decision & Orders) in Clinton King v. Metroplus, 2021 WL 585923 (2d Cir. December 2021), which articulated the Plaintiff-Appellant: ... ("King's barebones complaint, even if construed liberally as is appropriate for the complaint of a pro se litigant, contains no allegation of a policy or practice that was responsible for the change in his designated healthcare provider, nor does it allege a pattern of any other such incidents from which we might infer the existence of an unlawful policy or practice")(Citations omitted)). In contrast, the Plaintiff-Appellant's Appellate Briefs and Supplemental Briefs together with the (Title 42 U.S.C. § 1983) filed before the district court below articulated the defendant[s] on-going unlawful pattern and practice as ("Policy-Makers") were violative of the Fourteenth Amendment[s] inter alia. Furthermore, the Plaintiff-Appellant had documentary evidence supporting his claim[s] and authority stare decisis from this Honorable Court respectively.

5. In addition the government never filed any Appellate Briefs which could have disputed Plaintiff-Appellant's argument[s] as cited by stare decisis respectively.

WHEREFORE, Plaintiff-Appellant prays for the relief sought as it may be deem, just, and proper as a matter of Federal Constitutional Law respectively.

DATED: June 22, 2022

TO: Sarah Rosenbluth, Eqs.,
Assistant Solicitor General
New York State Office of
The Attorney General,
Division of Appeals & Opinions
The Capitol
Albany, New York 12224

Respectfully submitted,

By: _____

Wamel Allah #77B-0684 Plaintiff-Appellant Pro se
Adirondack Correctional Facility
P.O. Box 110
196 Raybrook Road
Raybrook, New York 12977

Sworn to before me this 22 day of June 2022

Title 28 USC 1746

Notary Public

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