APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 24-1322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ANNABEL II, Plaintiff-Appellant, v. SHERMAN CAMPBELL, Warden, et al., Defendants-Appellees, and DAVID MESSER, Defendant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: STRANCH, MURPHY, and MATHIS, Circuit Judges.

Robert Annabel II, a pro se Michigan prisoner, appeals the district court's decision granting summary judgment to the defendants in his civil rights action brought under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.* This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). We affirm.

Annabel brought this action in 2020 concerning events that took place at the Gus Harrison Correctional Facility while he was incarcerated by the Michigan Department of Corrections (MDOC). He sued Warden Sherman Campbell, Deputy Warden David Messer, Classification Director Christina Bates, Grievance Coordinator Stacy Ream, Assistant Deputy Warden Brian Evers, Grievance Manager Richard Russell, Sergeant Mark Houser, Resident Unit Manager Arthur

Thomas, and MDOC Director Heidi Washington. According to his complaint, Annabel's religious beliefs require him to strictly observe a weekly sabbath from sundown Friday to sundown Saturday, during which he cannot work, receive wages, or engage in financial transactions. This religious practice was encumbered, he claimed, because, for approximately six months, he was assigned to a prison work detail that sometimes scheduled him to work on Fridays and Saturdays.

He complained in writing to Campbell and Messer and submitted grievances to Ream and Evers, but his entreaties were rejected. The grievance rejections were upheld by Russell. After many of his grievances were rejected, Annabel sent a kite to Ream complaining that "You are a very corrupt defendant." In response, Ream issued Annabel a misconduct ticket for "insolence." Houser reviewed the misconduct ticket with Annabel, as did Evers. Thomas ultimately held a hearing and found Annabel guilty. Annabel also alleged that MDOC maintained a "vague" policy that defines insolence to include accusing an employee of corruption. Based on these allegations, Annabel claimed, among other things, that his free-exercise rights under the First Amendment and RLUIPA were violated, he suffered retaliation under the First Amendment, and the insolence policy violated his free-speech and due-process rights.

After the defendants moved for partial summary judgment for failure to exhaust administrative remedies, the district court dismissed Annabel's claims except for his free-exercise and RLUIPA claims and his retaliation claim against Ream. Annabel later voluntarily dismissed any claims against Messer. Following discovery, both Annabel and the defendants moved for summary judgment on the merits. A magistrate judge recommended denying Annabel's motion and granting the defendants' motion. Over Annabel's objections, the district court adopted the report and recommendation and granted summary judgment in favor of the defendants.

Annabel now appeals, arguing that (1) he demonstrated a substantial burden to his religious exercise, (2) charging him with insolence for calling a prison employee corrupt violates his free-speech rights, (3) defendants Campbell, Bates, Ream, Evers, Russel, Houser, and Thomas were personally involved in the deprivation of his rights, (4) he exhausted his available administrative remedies concerning additional retaliation claims, and (5) the district court abused its discretion

by failing to compel the defendants to provide information concerning other prisoners' rejected grievances.

We review a district court's grant of summary judgment de novo. *Stein v. Gunkel*, 43 F.4th 633, 639 (6th Cir. 2022). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In resolving summary-judgment motions, courts view the evidence in the light most favorable to the non-moving party. *Burwell v. City of Lansing*, 7 F.4th 456, 462 (6th Cir. 2021).

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability," unless the government establishes that the burden furthers "a compelling government interest" and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a); *see Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). The burden is on the plaintiff to show that "the relevant exercise of religion is grounded in a sincerely held religious belief" and that the challenged "policy substantially burdened that exercise of religion." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015). If the plaintiff meets that, the burden shifts to the defendant to show that the policy "(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest." *Id.* at 362 (alterations in original) (quoting 42 U.S.C. § 2000cc-1(a)). In the prison context, a burden is substantial where it forces an individual to choose between confronting "serious disciplinary action" for following his religious beliefs or complying with a policy that requires him to "engage in conduct that seriously violates [his] religious beliefs." *Id.* at 361 (alteration in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014)); *see Living Water Church of God v. Charter Township of Meridian*, 258 F. App'x 729, 733-34 (6th Cir. 2007).

The district court did not err by concluding that Annabel failed to show a substantial burden on his religious exercise. Even if he was sometimes scheduled to work on Fridays and Saturdays, Annabel provided no evidence that he was ever required to work on those days or that he was

punished for failing to do so. Rather, according to his deposition, when he was scheduled to work on those days, he requested not to work due to his religious beliefs, and he was always excused with permission and was never reprimanded or threatened.

Annabel next contends that, even if he did not work on any Friday or Saturday, he nonetheless received payment on Fridays and Saturdays, thus violating his religious beliefs. But he provided no evidence to support this assertion beyond the allegations in his complaint, and MDOC policy provides that prisoners do not receive payment when they are excused from work for religious reasons. Annabel asserts that the district court relied on an alleged typographical error in his deposition transcript in which he appears to admit that he did not receive any pay for work on those days. But even if his interpretation of the transcript is correct, his claim still fails. Most significantly, he presented no evidence that any of the named defendants were personally involved in the payment system or the disbursement of funds, even if he indeed received automatic payments during his sabbath. *See Heyerman v. County of Calhoun*, 680 F.3d 642, 647 (6th Cir. 2012) (requiring personal involvement to state a § 1983 claim).

Given this lack of evidence, summary judgment was correctly granted to the defendants on this claim. And because the First Amendment is less protective than RLUIPA, Annabel's free-exercise claim necessarily fails as well. *See Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010). And although Annabel also argues that several of the defendants were personally involved in violating his rights, and specifically that he was given the "runaround" about who was responsible for scheduling him to work on his sabbath, that argument is irrelevant because he has not shown that his rights were violated.

We turn next to Annabel's retaliation claim against Ream, which requires him to "show that (1) he engaged in protected conduct; (2) the defendant took an adverse action against him 'that would deter a person of ordinary firmness from continuing to engage in that conduct'; and (3) . . . the adverse action was taken (at least in part) because of the protected conduct." *Thomas v. Eby*, 481 F.3d 434, 440 (6th Cir. 2007) (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (per curiam)). Annabel sent a kite to Ream on April 16, 2020, stating, "You are

a very corrupt defendant. I demand a Step II Appeal form for ARF/20/04/701/272." Ream responded by issuing him a misconduct report for insolence, accusing him of making the statement to "harass and degrade" her. Thomas found Annabel guilty of misconduct. The district court concluded that Ream was entitled to qualified immunity on this claim because Annabel's statement was not protected conduct, or at least not clearly so.

Although filing a grievance may qualify as protected conduct, "[a]busive or manipulative use of a grievance system would not be protected conduct." *King v. Zamiara*, 680 F.3d 686, 699 (6th Cir. 2012). "[I]f a prisoner violates a legitimate prison regulation, he is not engaged in 'protected conduct.'" *Lockett v. Suardini*, 526 F.3d 866, 874 (6th Cir. 2008) (quoting *Thaddeus-X*, 175 F.3d at 394). We have held that MDOC's policy against insolent behavior, which includes using words intended to harass or degrade an employee, is a legitimate prison regulation, the violation of which does not qualify as protected conduct. *See id.* Here, Annabel accused Ream of being corrupt within a simple request that she provide him with a form, which Ream reasonably interpreted as insolence. Although this statement was not vulgar, it was still derogatory and without any non-harassing purpose given its context. *See id.*; *see also Caffey v. Maue*, 679 F. App'x 487, 490-91 (7th Cir. 2017) (order) (calling guards unprofessional was not protected conduct because it was not an attempt to resolve a complaint but instead a challenge to their authority). Because Annabel has not shown the violation of a clearly established right, summary judgment was properly granted on his retaliation claim against Ream. Annabel also argues that Houser, Thomas, Campbell, Evers, and Washington were complicit in the alleged retaliation, but in the absence of a viable claim against Ream, any claim against them fails as well.

Annabel next argues that the district court misunderstood his objection regarding exhaustion of administrative remedies. He asserts that they were not available for his retaliation claim because MDOC considers challenges to disciplinary proceedings to be non-grievable and that he could not file grievances against some defendants because they were not involved until they later denied his grievances and appeals concerning his religious exercise. But even assuming that Annabel is correct and that the district court misunderstood his arguments concerning

exhaustion, he still has not demonstrated that his religious-exercise or retaliation claims would have been viable against any of the defendants. This argument therefore does not provide a basis to vacate the district court's judgment.

Lastly, Annabel claims that the district court abused its discretion by denying his motion to compel discovery related to the denial of grievances filed by other inmates, which he argues would have helped him show the truth of his accusation that Ream is corrupt. But he did not object to the magistrate judge's discovery order, despite being given notice to do so. If a party disagrees with a magistrate judge's non-dispositive order, he must "serve and file objections to the order within 14 days after being served with a copy." Fed. R. Civ. P. 72(a). Timely objections must be submitted to the district court "to avoid [forfeiting] appellate review." *Miller v. Meyer*, 644 F. App'x 506, 509 (6th Cir. 2016) (quoting *Smith v. Detroit Fed'n of Tchrs. Loc. 231*, 829 F.2d 1370, 1373 (6th Cir. 1987)); *see Hoven v. Walgreen Co.*, 751 F.3d 778, 782 (6th Cir. 2014). Annabel has thus forfeited his right to appeal that ruling. And he has not demonstrated that he was somehow prevented from objecting or that the forfeiture should be excused in the interests of justice. *See Alspaugh v. McConnell*, 643 F.3d 162, 166 (6th Cir. 2011); *Kent v. Johnson*, 821 F.2d 1220, 1223 (6th Cir. 1987).

For the foregoing reasons, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 04/02/2025.

Case Name: Robert Annabel, II v. Sherman Campbell, et al
Case Number: 24-1322

Docket Text:
ORDER filed : We AFFIRM the district court's judgment. Mandate to issue, decision not for publication, pursuant to FRAP 34(a)(2)(C). Jane Branstetter Stranch, Circuit Judge; Eric E. Murphy, Circuit Judge and Andre B. Mathis, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Robert Annabel II
Macomb Correctional Facility
34625 26 Mile Road
Lenox Township, MI 48048-3000

A copy of this notice will be issued to:

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Ms. Jennifer Ann Foster

UNITED STATES COURT OF APPEALS
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No. 24-1322

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v.

SHERMAN CAMPBELL, Warden, et al.,

Defendants-Appellees,

and

DAVID MESSER,

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Before: STRANCH, MURPHY, and MATHIS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Robert Annabel, II,

Plaintiff,

v.

Sherman Campbell, *et al.*,

Defendants.

/

Case No. 20-cv-11114

Judith E. Levy
United States District Judge

Mag. Judge David R. Grand

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [44]

On January 4, 2022, Magistrate Judge David R. Grand issued a Report and Recommendation ("R&R") (ECF No. 44) recommending the Court grant in part and deny in part the motion for partial summary judgment for failure to exhaust administrative remedies filed by Defendants Sherman Campbell, David Messer, Christina Bates, Stacey Ream, Brian Evers, Richard Russell, Mark Houser, Arthur Thomas, and Heidi Washington. (ECF No. 36.) The R&R concludes that "Defendants are entitled to summary judgment on the basis of exhaustion on all but [Plaintiff Robert] Annabel[, II]'s First Amendment free exercise and

RLUIPA [Religious Land Use and Institutionalized Persons Act] claims, and his claim of a retaliatory misconduct ticket against Ream." (ECF No. 44, PageID.356.) The R&R recommends dismissing Plaintiff's First Amendment free speech claim; his Eighth Amendment, Fourteenth Amendment, and ADA claims; and his First Amendment retaliation claim against the Defendants other than Ream. (*Id.* at PageID.366–367.)

On January 13, 2022, Plaintiff filed five timely objections to the R&R under Federal Rule of Civil Procedure 72(b)(2) and Eastern District of Michigan Local Rule 72.1(d). (ECF No. 45.) In his objections, Plaintiff states that he wishes to pursue his "Free Exercise, RLUIPA, and retaliation claims" and that he wants to abandon his "ADA, 14th Amendment due process, Eight [sic] Amendment, and all State law claims." (*Id.* at PageID.387.) Because the R&R ruled in his favor for the Free Exercise and RLUIPA claims, only the retaliation claim is in dispute. Plaintiff's first objection appears to address Defendants' argument in their motion for partial summary judgment that Plaintiff failed to exhaust his administrative remedies. (*Id.* at PageID.376–377.) In his second objection, Plaintiff argues that he should not have to comply with the Prison Litigation Reform Act's ("PLRA") exhaustion

requirement when prison officials tell him that a particular issue is non-grievable. (*Id.* at PageID.377–379.) In his third objection, Plaintiff argues that he properly exhausted his claims even though he did not name all Defendants at Step I of the grievance process. (*Id.* at PageID.380–383.) The subject of Plaintiff's fourth objection is unclear, but he appears to argue that his failure to exhaust is not relevant to the merits of his retaliation claim. (*Id.* at PageID.383–386.) In his fifth objection, Plaintiff argues that all Defendants were "personally involved" in violating his rights. (*Id.* at PageID.386–387.) Defendants responded to these objections. (ECF No. 46.)

For the reasons set forth below, Plaintiff's objections (ECF No. 45) are overruled, and the R&R (ECF No. 44) is adopted. Accordingly, Defendants' motion for partial summary judgment for failure to exhaust administrative remedies (ECF No. 36) is granted in part and denied in part.

I. Background

The Court adopts by reference the background set forth in the R&R, having reviewed it and finding it to be accurate and thorough. (*See* ECF No. 44, PageID.347–352.)

II. Legal Standard

A party may object to a magistrate judge's report and recommendation on dispositive motions, and a district judge must resolve proper objections under a *de novo* standard of review. *See* 28 U.S.C. § 636(b)(1)(B)–(C); Fed. R. Civ. P. 72(b)(1)–(3). "For an objection to be proper, Eastern District of Michigan Local Rule 72.1(d)(1) requires parties to 'specify the part of the order, proposed findings, recommendations, or report to which [the party] objects' and to 'state the basis for the objection.'" *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018) (alteration in original). Objections that restate arguments already presented to the magistrate judge are improper, *see Coleman-Bey v. Bouchard*, 287 F. App'x 420, 422 (6th Cir. 2008) (citing *Brumley v. Wingard*, 269 F.3d 629, 647 (6th Cir. 2001)), as are those that dispute the general correctness of the report and recommendation. *See Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Moreover, objections must be clear so that the district court can "discern those issues that are dispositive and contentious." *Id.* (citing *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)); *see also Thomas v. Arn*, 474 U.S. 140, 147 (1985) (stating that

objections must go to "factual and legal" issues "at the heart of the parties' dispute"). In sum, objections must be clear and specific enough that the Court can squarely address them on the merits. *See Pearce*, 893 F.3d at 346. Because Plaintiff is self-represented, the Court will construe his objections liberally. *See Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) ("Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings.").

III. Analysis

A. Objection 1

Plaintiff's first objection appears to address Defendants' argument in their motion for partial summary judgment that Plaintiff failed to exhaust his administrative remedies. Specifically, Plaintiff argues that Defendants "waive their defense of failure [to] exhaust" because they changed their reason for rejecting his grievance. (ECF No. 45, PageID.377.) Defendants state in their response to the objections that Plaintiff's "first two objections address [Defendants'] arguments that [grievances] ARF-2470 and ARF-2531 failed to exhaust administrative remedies—an issue which the R&R recommends the Court find in

Annabel's favor—so . . . Defendants will not address them." (ECF No. 46, PageID.391.)

The Court agrees with Defendants that Plaintiff's first objection relates to Defendants' arguments about exhaustion in their motion for partial summary judgment. Plaintiff's objection does not appear to respond to the R&R. This court recently stated that

> [w]hen a party properly objects to portions of a magistrate judge's report and recommendation, the Court reviews such portions *de novo*. *See* Fed. R. Civ. P. 72(b). However, only specific objections that pinpoint a source of error in the report are entitled to *de novo* review. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986). General objections—or those that do nothing more than disagree with a magistrate judge's determination, without explaining the source of the error—have "the same effect[ ] as would a failure to object." *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). That is, such objections are not valid, and the Court may treat them as if they were waived. *See Bellmore-Byrne v. Comm'r of Soc. Sec.*, No. 15-11950, 2016 WL 5219541, at *1 (E.D. Mich. Sept. 22, 2016) (citing *id.*). Similarly invalid are objections "that merely reiterate[ ] arguments previously presented, [without] identify[ing] alleged errors on the part of the magistrate judge." *See id.*

McClure v. Comm'r of Soc. Sec., No. 20-12517, 2022 WL 730631, at *1 (E.D. Mich. Mar. 10, 2022) (alterations in original); *see Miller*, 50 F.3d at 380 ("In *Howard v. Secretary of Health and Human Servs.*, 932 F.2d 505,

508–09 (6th Cir. 1991), we held that a general objection to a magistrate's report, which fails to specify the issues of contention, does not satisfy the requirement that an objection be filed."). Plaintiff's first objection is invalid because it does not identify a source of error in the R&R. Accordingly, Plaintiff's first objection is overruled.

B. Objection 2

In his second objection, Plaintiff argues that he should not have to comply with the PLRA's exhaustion requirement when prison officials prevent him from doing so or tell him that a particular claim is a "non-grievable issue." (ECF No. 45, PageID.378.) Plaintiff argues that

> [f]or the Federal court to tell a prisoner that he was required to exhaust his administrative remedies by filing a grievance or grievance appeal for an issue that prison officials told him in their own writing is a "non-grievable issue" is an absurd judicial expectation contrary even to the Congressional and Judicial concepts of the PLRA which penalizes prisoners for filing claims that a [sic] frivo;lous [sic] or fail to state a claim upon which relief could be granted or for lack of jurisdiction. [E]ssentially what the court is telling Plaintiff is, that in order to exhaust, he must intentionally abuse the grievance procedure by filing grievances and appeals that prison officials have expressly told him are a "non-grievable issue." And if Plaintiff were to comply with this judicially absurd expectation, like the PLRA "three strikes provision, MDOC Policy would also penalize him with Modified Grievance access and its practice to restrict his ability to continue

> accessing the grievance procedure at all until the Modified Access period expires after a minimum of three months.

(*Id.* at PageID.378–379.) Defendants do not address this objection in their response to Plaintiff's objections because they state that the objection pertains to "an issue which the R&R recommends the Court find in Annabel's favor." (ECF No. 46, PageID.391.)

Although Plaintiff objects to the grievance process in general, he does not clearly identify an error in the R&R. Further, the Court agrees with Defendants that Plaintiff's objection appears to relate to an issue that the R&R resolved in his favor. Objections must go to "factual and legal" issues "at the heart of the parties' dispute." *Thomas*, 474 U.S. at 147. Plaintiff's objection does not go to a factual or legal issue in dispute. Accordingly, Plaintiff's second objection is overruled as invalid.

C. Objection 3

In his third objection, Plaintiff claims that he "properly exhausted his administrative remedies" even though he did not name all Defendants at Step I of his grievance. (ECF No. 45, PageID.380.) Plaintiff argues that

> the MDOC grievance policy's name-all-defendants requirement is vague. In fact, it says nothing about the requirement only being satisfied if all involved prison

> employees are named by the prisoner at Step I. Policy ***does not*** tell the prisoners that they ***cannot*** name a defendant later at Step II or Step III before full conclusion of a particular grievance.
>
> Moreover, Plaintiff clearly explained to this court in his claim and in response to defendant's motion for summary judgment that he took affirmative efforts to discover which employees were involved . . . and was told he only needed to grieve the Classification Director Bates who was involved in issuing work assignments. He was misled to the identity of other defendants until after he had filed his Step I grievance. In fact, some of the defendants were not involved until ***after*** the Step I grievance had been filed.
>
> * * *
>
> But Defendant[s] have a fatal flaw in the failure to exhaust defense when asserting that Plaintiff failed to name them all in his Step I grievance rather than in the later appeals: Defendants waived the argument by not asserting any such irregularity in any of their responses to his grievance and its appeal.

(*Id.* at PageID.381–383 (emphasis in original).) Plaintiff also argues that

> when prison policy has a name-all-defendants requirement, a prisoner may be excused for failing to identify a particular defendant by name where it should be obvious to prison officials which employees were involved in the issue being grieved. *Dearduff v. Washington*, 330 F.R.D. 452, 470 (E.D. Mich. 2019).
>
> * * *

> [A]s held in *Dearduff, supra*, it would have been obvious to the MDOC from Plaintiff's facts stated in his grievance and appeals which employees had been involved or when they did become involved in the ongoing issue even if Plaintiff did not yet know the names of all those involved. MDOC had its fair chance to remedy the grieved issue according to the intent of the PLRA.

(*Id.* at PageID.381, 383.)

Defendants respond that

> [o]bjection 3 appears to be directed at the R&R's recommendation that Annabel failed to exhaust his remaining retaliation claims because he did not name the defendants at Step I of a grievance. (ECF No. 44, PageID.366–367.) As the R&R explained, the relevant policy requires that Annabel name the individuals being grieved at Step I, and Annabel needed to have named these individuals once he learned of their identities. (*Id.*) If, as Annabel contests, some of the defendants were not involved until after the Step I of a grievance, then Annabel needed to have filed separate grievances concerning their actions. (ECF No. 45, PageID.382.) Annabel's failure to do so means that he did not exhaust available remedies against them. The Court should therefore overrule this objection.

(ECF No. 46, PageID.392–393.)

In his objection, Plaintiff does not identify an error in the R&R's interpretation of the grievance policy. The R&R properly notes that the grievance policy requires that the grievant include the "names of all those

involved in the issue being grieved" for a "Step I Grievance." (ECF No. 44, PageID.366; ECF No. 36-2, PageID.210.) Although, as Plaintiff argues, the policy does not explicitly prohibit naming additional individuals at Step II or III of the grievance process, this prohibition is implied by the requirement that "all those involved in the issue being grieved" be named at Step I. In addition, Plaintiff's argument that it would have been obvious to MDOC which Defendants were involved appears to object to either MDOC's behavior or the grievance policy itself, not the reasoning in the R&R. Finally, Plaintiff's assertion that Defendants waived their argument regarding the failure to exhaust is a restatement of Plaintiff's argument in his first objection and has already been addressed. Thus, Plaintiff's third objection is denied.

D. Objection 4

Plaintiff's fourth objection is difficult to understand. He states that

> courts must not confuse the question of defendants' liability on the merits with the 'separate and distinct' question whether Plaintiff has exhausted administrative remedies.
>
> * * *
>
> The MDOC policy and actual practice is that all issues related to the prisoner misconduct process (retaliatory tickets, sergeant review of tickets, hearing investigation, hearing, sanctions issued by a hearing officer, appeal, ect. [sic]) are non-grievable issues. However, Plaintiff was required to use

the appeal process, which is limited to issues involving a hearing officer's decisions only, and Plaintiff did pursue the misconduct hearing and appeal process as the only remedies available to him.

Moreover, Defendant Ream violated Plaintiff's First Amendment rights by retaliating for the first lawsuit against her upon his free speech complaining and announcing to her alone: "You are a very corrupt defendant." She issued an insolence ticket in revenge and to deter him from future misconduct. Plaintiff's complaint also alleged that it was followed by Sergeant Houser and Assistant deputy Warden Evers also made credible threat to further retaliate if Plaintiff continued to file any more grievances or lawsuit in that particular matter.

The Report and Recommendation (PgId No. 367) commits a red herring and Strawman fallacy when addressing whether the threats excuse Plaintiff's failure to continue writing and naming such defendants in a grievance. In deed [sic], the easy conclusion this strawman offers is an utter red herring. Just because MDOC policy says that employees are prohibited from retaliating against prisoners for writing grievances proves absolutely nothing relevant at all. It does not prove that all MDOC employees refrain from retaliating just because policy says so, neither that any of these particular defendants would have refrained from retaliating against plaintiff if he defied their orders by filing additional grievances naming each of them. However, Plaintiffs [sic] declarations that Defendant Ream and other defendants had already retaliated in the matter, and that Plaintiff's complaint and declarations describe to the court the threats defendants made if he continued to complain or file lawsuits,

> create a genuine issue of material fact whether defendants used affirmative misconduct to deter Plaintiff.

(ECF No. 45, PageID.384–386.)

> Defendants respond to this objection as follows:
>
> Although objection 4 references PageID.367 of the R&R, it is not clear the subject of Annabel's objection. To the extent that Annabel is contesting that he is excused from filing grievances naming certain individuals, the R&R addressed his arguments in PageID.366–367. If Annabel is contesting that he did not need to file grievances regarding the misconduct policy because the subject matter of his grievance is not grievable, the R&R explains how the different aspects of his claims contesting the application of the misconduct policy were grievable in PageID.367–372. Annabel does not explain how the R&R erred in its analysis. The Court should therefore overrule this objection.

(ECF No. 46, PageID.393.)

The Court agrees with Defendants that Plaintiff's objection is unclear. Although his objection references a specific page number of the R&R, it is not clear what part of the R&R's analysis he objects to. His objection appears to relate to his retaliation claim, but he does not specify how the R&R erred other than to say it "commits a red herring and Strawman fallacy." Objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious." *Miller*,

50 F.3d at 380. Plaintiff's objection lacks the clarity necessary for the Court to identify and review any dispositive issues that are in dispute. Accordingly, Plaintiff's fourth objection is overruled as invalid.

E. Objection 5

Plaintiff's fifth objection is also difficult to decipher. Plaintiff argues in this objection that all Defendants were "personally involved" in violating his rights. (ECF No. 45, PageID.386.) Plaintiff argues that any Defendants who were "not involved in the initial violation when Plaintiff filed his Step I grievance" became "personally involve[d]" through their actions and "decrees" in the grievance process. (*Id.* at PageID.387.) Plaintiff presents a hypothetical about a prison doctor cutting off his hands "for no medical reason at all." (*Id.*) Plaintiff states that if the doctor cuts off one hand and Plaintiff then "writes a grievance to save the remaining hand" that is denied by "grievance responder[s]" (resulting in the doctor cutting off his second hand), the "grievance respondents" are not "immune for their participation in causing the prisoner to lose his second hand by . . . authorizing the doctor to cut off the second hand." (*Id.* at PageID.386–387.) The argument in Plaintiff's fifth objection possibly

repeats the argument in Plaintiff's third objection that he should not have to name all Defendants at Step I of the grievance process.

Plaintiff's fifth objection is unclear and does not challenge a specific portion of the R&R. In addition, Plaintiff's objection appears to restate the argument Plaintiff asserts in his third objection, which the Court rejected above. Accordingly, Plaintiff's fifth objection is invalid and is overruled.

IV. Conclusion

For the reasons set forth above, the Court ADOPTS the R&R. (ECF No. 44.) Defendants' motion for partial summary judgment on the basis of exhaustion (ECF No. 36) is GRANTED IN PART AND DENIED IN PART. Accordingly, Plaintiff's remaining claims include only his First Amendment free exercise and RLUIPA claims, as well as his retaliation claim against Ream.

IT IS SO ORDERED.

Dated: September 29, 2022
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or first-class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 29, 2022.

s/Erica Parkin for
WILLIAM BARKHOLZ
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ANNABEL, II,

Plaintiff,

Civil Action No. 20-11114

v.

Judith E. Levy
United States District Judge

SHERMAN CAMPBELL, *et al.*,

David R. Grand
United States Magistrate Judge

Defendants.
_____/

REPORT AND RECOMMENDATION TO GRANT IN PART AND DENY IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 36)

Pro se plaintiff Robert Annabel, II ("Annabel"), who was incarcerated within the Michigan Department of Corrections ("MDOC") during the relevant time period[1], brings this civil rights action pursuant to 42 U.S.C. § 1983, against MDOC employees Sherman Campbell, David Messer, Christina Bates, Stacey Ream, Brian Evers, Richard Russell, Mark Houser, Arthur Thomas, and Heidi Washington (collectively, "Defendants"). (ECF No. 1). An Order of Reference was entered on May 6, 2021, referring all pretrial matters to the undersigned pursuant to 28 U.S.C. § 636(b). (ECF No. 23).

On July 13, 2021, Defendants filed a Motion for Partial Summary Judgment on the Basis of Exhaustion. (ECF No. 36). Annabel filed an amended response on August 20,

[1] Annabel was paroled after he commenced this action. (*See* ECF No. 38).

2021, and Defendants filed a reply on September 23, 2021. (ECF Nos. 42, 43).[2]

The Court finds that the facts and legal issues are adequately presented in the briefs and on the record, and it declines to order a hearing at this time. *See* E.D. Mich. LR 7.1(f).

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Defendants' Motion for Partial Summary Judgment **(ECF No. 36)** be **GRANTED IN PART AND DENIED IN PART**.

II. REPORT

A. Background

1. The Underlying Incidents

Annabel is a recent MDOC parolee who, at all relevant times, was confined at the Gus Harrison Correctional Facility ("ARF") in Adrian, MI. He brings this § 1983 civil rights action, alleging violations of his rights under the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA").

In his operative amended complaint, Annabel alleges a series of events stemming from his assignment to a weekly work detail during the Sabbath by Corrections Program Coordinator Christina Bates ("Bates") in September 2019, which allegedly violated his religion and led to his filing a grievance. (ECF No. 18, PageID.132-33). As a result, Annabel asserts that, "in a conspiracy to continue the violations of [his] free exercise

[2] While Annabel's amended response was mailed on August 20, 2021, his filing was not docketed until September 9, 2021. (8/20/2021 dkt. entry).

rights," Warden Sherman Campbell ("Campbell"), Deputy Warden David Messer ("Messer"), Grievance Coordinator Stacey Ream ("Ream"), Assistant Deputy Warden Brian Evers ("Evers"), Grievance Manager Richard Russell ("Russell"), Sergeant Mark Houser ("Houser"), and Resident Unit Manager Arthur Thomas ("Thomas"), subjected him to a series of retaliatory "harassment and corruption" through "malicious effort[s] to obstruct the grievance process" by "falsely reject[ing]" his grievance and "threaten[ing] to retaliate if [Annabel] continued to file grievances." (*Id.*, PageID.133-35). Annabel further asserts that MDOC Director Heidi Washington ("Washington") upholds an "overbroad" and "vague" prisoner discipline policy that "promote[s] retaliation with impunity," denies "reasonable notice" for discipline, and "disparately impacts prisoners with mental illness behavioral issues." (*Id.*, PageID.137-38).

Specifically, Annabel alleges that his "religion is a form of Christianity that observes the weekly Sabbath [from] sundown Friday to sundown Saturday," during which "no work must be done, nor wages received." (*Id.*, PageID.132). However, in September 2019, Bates allegedly "assigned [Annabel] an on-grounds maintenance work detail" for "Fridays and Saturdays." (*Id.*, PageID.132-33). After several "failed attempts" to "exchange" his scheduled workdays during the Sabbath with his usual days off on "Wednesdays and Thursdays," Annabel "wrote a grievance." (*Id.*, PageID.133). According to Annabel, "[t]here was no legitimate penological interest or even a compelling governmental interest behind denying his request." (*Id.*).

Starting from this point, Annabel allegedly became the target of a "conspiracy to continue the violations of [his] free exercise rights." (*Id.*). He alleges that, in "a malicious

effort to obstruct the grievance process," Ream and Evers "falsely rejected the grievance at Step I" without addressing it "on the merits," even though he "clearly followed the grievance policy." (*Id.*). Ream and Evers "also threatened to retaliate if [he] continued to file grievances by placing him on Modified Grievance Access for 3 months." (*Id.*, PageID.133-34).

When Annabel appealed "the grievance to Step II," Campbell allegedly "changed the obviously false rejection to a new false rejection for non-grievable issue, claiming that Plaintiff has no religious rights under MDOC policy or the Constitution." (*Id.*, PageID.134). He then appealed "the grievance to Step III," at which point Russell "upheld the malicious rejection that the issue was non-grievable and that Plaintiff had no religious rights." (*Id.*). Annabel alleges that, throughout "2019 and 2020," Campbell and Ream "began another campaign of retaliatory harassment by falsely rejecting any grievance alleging unconstitutional conditions, . . . [and] repeatedly threatened Plaintiff with Modified Grievance Access." (*Id.*, PageID.135).

Annabel further alleges that, when "the harassment and corruption continued," he sent a kite to Ream on April 17, 2020, stating, "You are a very corrupt defendant," which he contends was a "true statement of both Campbell and Ream as protected speech." (*Id.*). In response, Ream issued Annabel a "Class II Insolence misconduct charge," violating his "right to criticize her for being corrupt and that such was being litigated." (*Id.*). Houser reviewed the misconduct ticket on April 20th, but despite Annabel's explanation that the ticket "was retaliation for protected speech, not insolence," Houser failed to "quash the ticket" and instead stated that "Campbell and Ream would write more tickets if he

continued to complain or file grievances." (*Id.*, PageID.136). On April 22nd, Annabel showed the ticket to Evers, who allegedly responded, "We don't give a sh** about your lawsuits. I would find you guilty, and, yes, we can write you a ticket at any time you file a grievance or a lawsuit," threatened him with "more time in prison," and said that "Campbell disapproves of Plaintiff's protected conduct." (*Id.*). On April 24th, Thomas held a misconduct hearing and, with "retaliatory motive and intent," found Annabel guilty. (*Id.*). Annabel then filed "a misconduct appeal," which Campbell "denied [] personally." (*Id.*).

Finally, Annabel alleges that Washington "upholds a policy or custom to never discipline any employee who retaliates" because the definition of "Insolence" under Policy Directive 03.03.105 was so "overbroad" that it included First Amendment "protected conduct," but also so "vague [] that it failed to give him reasonable notice that complaining that an employee was 'a very corrupt defendant' constituted 'Insolence,'" in violation of Fourteenth Amendment due process. (*Id.*, PageID.137). He also asserts that Washington and Campbell "subjected [him] to cruel and unusual punishment [under the Eighth Amendment] by refusing to authorize a waiver of the Loss of Privileges sanctions he has served since June 2014 despite a period of nearly a year without misconduct (only the retaliatory 'Insolence' charge)," and "violated the ADA with a Prisoner Discipline Policy that disparately impacts mentally ill prisoners while refusing to reasonably accommodate them with sanction waivers for improved behavior." (*Id.*, PageID.139).

Based on the above allegations, Annabel sues the Defendants "in their personal capacities for alleged violations of the Constitution, but in their official capacities for

RLUIPA and ADA claims." (*Id.*, PageID.132). Specifically, he brings (1) First Amendment free exercise and RLUIPA claims against Campbell, Messer, Bates, Ream, Evers, and Russell; (2) First Amendment retaliation claims against Campbell, Ream, Evers, Houser, and Thomas; (3) First Amendment free speech and Fourteenth Amendment due process claims against Washington; and (4) Eighth Amendment and ADA claims against Washington and Campbell. (*Id.*, PageID.138-39). Annabel seeks, among other relief, monetary damages, and injunctive relief to stop being forced to "work or accept wages on the Sabbath days" and to "expunge the 'Insolence' charge" and waive the related sanctions stemming from that charge. (*Id.*, PageID.139-40).

Defendants now move for partial summary judgment on Annabel's claims against them. Specifically, Defendants argue that they are entitled to summary judgment on all but one claim of a retaliatory misconduct ticket against Ream, based on Annabel's alleged failure to exhaust administrative remedies before filing this lawsuit.

B. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, the Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). A fact is material if it might affect the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court assumes the truth of the non-moving party's evidence and construes all reasonable inferences from that evidence in the light most

favorable to the non-moving party. *See Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and must identify particular portions of the record that demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In response to a summary judgment motion, the opposing party may not rest on its pleadings, nor "'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in order to defeat the motion." *Alexander*, 576 F.3d at 558 (internal quotations omitted).

C. Analysis

Under the Prison Litigation Reform Act ("PLRA"), a prisoner may not bring an action, "under [§ 1983] or any other Federal law," to challenge his conditions of confinement until all available administrative remedies have been exhausted. 42 U.S.C. § 1997e(a); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). This "exhaustion" requirement serves two main purposes: it promotes efficiency by encouraging the resolution of claims at the agency level before litigation is commenced, and it protects administrative authority by allowing the agency an opportunity to correct its own mistakes before being haled into

federal court. *See Woodford*, 548 U.S. at 89. The Supreme Court has held that this "exhaustion requirement requires proper exhaustion." *Id.* at 93. Proper exhaustion requires "compliance with an agency's deadlines and other critical procedural rules." *Id.* at 90. In determining whether a plaintiff has properly exhausted his claim, the only relevant rules "are defined not by the PLRA, but by the prison grievance process itself." *Jones v. Bock*, 549 U.S. 199, 200 (2007). Failure to exhaust is an affirmative defense that must be raised by a defendant, and on which the defendant bears the burden of proof. *See id.* at 216; *Does 8-10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019).

In their motion, Defendants "concede that Annabel exhausted claims arising out of [his] claim that Ream issued him a retaliatory misconduct ticket." (ECF No. 36, PageID.198). But as to Annabel's "remaining claims," Defendants assert that, between the date of the initial incident in September 2019 and the date of filing his amended complaint on February 12, 2021, Annabel only "pursued [seven grievances] through Step III." (*Id.*, PageID.188-90). Among these seven grievances, Defendants argue that only the following two were "related to claims raised in [his] lawsuit": ARF-19-10-2470-27Z ("ARF-2470"), which was rejected as untimely and/or non-grievable; and ARF-19-10-2531-28a ("ARF-2531"), which was rejected as duplicative of ARF-2470. (*Id.*, PageID.196, 199).[3]

[3] At one point, Defendants assert that "Annabel had pursued four grievances through Step III prior to filing this lawsuit," but this appears to be an error, as it is inconsistent with the table of grievances set forth in their motion (ECF No. 36, PageID.189-90), and the attached Step III Grievance Report (ECF No. 36-3, PageID.218-220), which both indicate that seven grievances had been fully pursued through Step III during the relevant period. Their motion also misstates grievance "ARF-19-10-2470-27Z" as "ARF-19-10-2470-**28a**," but the Step III Grievance Report and salient grievance documents make clear they are referring to "ARF-19-10-2470-27Z." (ECF No. 36, PageID.190,196; ECF No. 36-3, PageID.220, 266-69).

Defendants contend that "Annabel's other [five] Step III grievances did not involve any of the claims alleged in this lawsuit," so his "remaining claims are therefore unexhausted and subject to dismissal." (*Id.*, PageID.199).

In response, Annabel argues that he "did, in fact, properly exhaust all available administrative remedies" because ARF-2470 was improperly rejected as untimely and non-grievable, and that "Defendants[']] motion is hardly forthcoming [], misrepresents MDOC's grievance policy, and misstates the facts." (ECF No. 42, PageID.333-34).[4]

As an initial matter, Defendants' briefing for summary judgment based on a failure to exhaust all but one retaliatory misconduct ticket claim against Ream is cursory, as they essentially set forth a single argument that the only two relevant grievances exhausted through Step III during the relevant period were rejected on procedural grounds. Indeed, they make no effort to demonstrate that Annabel's relevant grievances were even ***properly rejected***, instead opting to simply rely on the fact that they were "rejected." However, the law is clear that a defendant cannot show a failure to exhaust merely by showing a grievance was "rejected." *See Johannes v. Washington*, No. 14-11691, 2016 WL 1253266, at *6 (E.D. Mich. Mar. 31, 2006) (rejecting an argument that a grievance was unexhausted merely because it was rejected as "duplicative" of a prior grievance, reasoning that "[i]f

[4] Defendants assert that "Annabel does not identify the grievance by which he exhausted his claims, [but] he is referring to ARF-2470 []." (ECF No. 43, PageID.343). As discussed below, a review of Annabel's amended complaint, response brief, and the salient grievance documents confirms that "the grievance" Annabel references throughout his complaint and filings is ARF-2470, given that it was the grievance he first filed concerning the work detail that triggered the events at issue here, and the only one rejected as untimely at Step I, but then rejected as "not grievable" at Steps II and III. (ECF No. 36-3, PageID.266-70).

this were the case, a prisoner would be barred from filing suit even if the grievance screener incorrectly rejects his grievance as duplicative.").

While somewhat difficult to decipher, careful review of Annabel's operative amended complaint indicates that he raises the following claims against Defendants: (1) First Amendment free exercise and RLUIPA claims based on his work detail during the Sabbath; (2) First Amendment retaliation claims for filing grievances and/or lawsuits; (3) First Amendment free speech and Fourteenth Amendment due process claims asserting that MDOC Policy Directive 03.03.105, "Prisoner Discipline" (the "Discipline Policy"), was both overbroad and vague as applied to him; (4) ADA claims based on the sanctions he received under the Discipline Policy, which "disparately impacts" him as a mentally-ill prisoner (ECF No. 18, PageID.139); and (5) Eighth Amendment claims based on a refusal to "authorize a waiver of Loss of Privileges sanctions [] despite a period of nearly a year without misconduct (only the retaliatory 'Insolence' charge)" (*Id.*, PageID.138). For the reasons discussed below, the Court finds that Defendants are entitled to summary judgment on the basis of exhaustion on all but Annabel's First Amendment free exercise and RLUIPA claims, and his claim of a retaliatory misconduct ticket against Ream.

1. First Amendment Free Exercise and RLUIPA Claims

In Michigan's correctional facilities, prisoner grievances are governed by MDOC Policy Directive 03.02.130, entitled "Prisoner/Parolee Grievances" (the "Grievance Policy").[5] A state prisoner must first complete the process outlined in the Grievance Policy

[5] The Defendants attach to their motion a copy of the 2007 version of the Grievance Policy. (*See* ECF No. 36-2, PageID.206-07) ("effective date 07/09/07"). However, because the events at issue

– including pursuing a grievance "regarding grievable issues" through "all three steps of the grievance process" – before he can file a lawsuit challenging the alleged unlawful conduct. (Grievance Policy, ¶ C).

As for "grievable issues," the Grievance Policy provides that "[g]rievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant, including alleged violations of this policy and related procedures." (*Id.* at ¶¶ C, F). Otherwise, "[a] grievance shall be rejected by the Grievance Coordinator if," in relevant part, "[t]he grievance is filed in an untimely manner" or "raises issues that are duplicative of those raised in another grievance filed by the grievant." (*Id.* at ¶ J).

As for the three-step process, the Grievance Policy provides that, "[p]rior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue []." (*Id.* at ¶ Q). If a prisoner cannot resolve his dispute, he "may file a Step I grievance," which "must be filed within five business days after the grievant attempted to resolve the issue with the appropriate staff." (*Id.*). "A grievant wishing to advance a grievance must send a completed Prisoner/Parolee Grievance form [] to the Step I Grievance Coordinator designated for the facility or other office being grieved." (*Id.* at ¶ W).

If the prisoner is dissatisfied with the Step I response, he may submit a grievance

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in this case began in "September 2019" (ECF 18, PageID.132-33), the 2019 version of the Grievance Policy, which went into effect on "03/18/2019," would have applied. *See* https://www.michigan.gov/documents/corrections/03_02_130_649677_7.pdf. Thus, the Court herein cites to the applicable 2019 version of the Grievance Policy (effective date 03/18/2019.).

appeal to the Step II Grievance Coordinator within ten business days after receipt of the Step I response. (*Id.* at ¶ DD). If the grievant is dissatisfied with, or does not receive, a Step II response, he has ten business days within which to file a final appeal at Step III. (*Id.* at ¶ HH). A "Business day" is defined as "Monday through Friday, 8:00 to 4:30, excluding State observed holidays." (*Id.* at ¶ A). "Grievances and grievance appeals at all steps shall be considered filed on the date received by the Department." (*Id.* at ¶ T).

a. Defendants Fail to Show that Annabel's First Amendment Free Exercise and RLUIPA Claims were Not Properly Exhausted Where They Assert Such Claims were Non-Grievable

In their motion, Defendants argue that ARF-2470 and ARF-2531 – the only two grievances "related to claims raised in [his] lawsuit" and pursued through Step III during the relevant period – were both rejected on procedural grounds and therefore unexhausted. (ECF No. 36, PageID.196, 199). In support of their argument, Defendants submit a Step III summary report, which reflects that Annabel only pursued seven grievances through Step III of the grievance process between the time of the initial incident in September 2019 and his filing of the amended complaint on February 12, 2021. (ECF No. 36-3, PageID.218-20). They also submit copies of the salient grievance documents, which confirm that only ARF-2470 and ARF-2531 – in which Annabel grieves that he was forced to work on the Sabbath against his religion and that his requests to switch his workdays were being ignored – are related to the claims raised in the amended complaint. (ECF No. 36-3, PageID.214-75).[6]

[6] The remaining five grievances consist of two alleging retaliatory denial of access to law library materials (*Id.*, PageID.243, 248), one alleging delays in legal mail (*Id.*, PageID.253), one alleging

In response to their motion, Annabel does not dispute the accuracy of the Step III Report, nor Defendants' contention that only ARF-2470 and ARF-2531 are related to the amended complaint. Instead, he argues that ARF-2470's rejection "at Step I as untimely" was "plainly erroneous" under the deadlines set forth in the Grievance Policy. (ECF No. 42, PageID.334). He further asserts that "timeliness was not the final reason for rejection at Step II and Step III appeal of [ARF-2470]" because "Campbell changed the initial erroneous rejection to a non-grievable issue rejection," and that if "this was a non-grievable issue," he "was not required to file a Grievance at all." (*Id.*).

In reply, Defendants appear to maintain that the First Amendment free exercise and RLUIPA claims were non-grievable, but nonetheless argue that ARF-2470 was also properly rejected as untimely and therefore unexhausted. Specifically, they argue:

> Although ARF-2470 ***was also rejected at Step II as non-grievable***, that does not change the fact that it was also properly rejected a[t] Step I as untimely. Because ARF-2470 was untimely filed at Step I, it could not exhaust any claims against MDOC Defendants, ***notwithstanding the fact that the subject matter was also deemed non-grievable***.

(ECF No. 43, PageID.343) (emphasis added).[7] In other words, Defendants argue that

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retaliatory termination from his work detail (*Id.*, PageID.258), and one alleging failure to deliver mail (*Id.*, PageID.263) – none of which correspond to the allegations in the amended complaint.

[7] While Defendants' position appears to be that ARF-2470 was properly designated as non-grievable at Steps II and III, it is unclear why Annabel's specific claims concerning First Amendment free exercise and RLUIPA violations would be considered non-grievable under the Grievance Policy. Defendants make no effort to explain why such claims are non-grievable, and the record does not provide sufficient clarity on this point, given that the Step II Response merely states that ARF-2470 was "Recoded [] as this issue is not grievable due to no violations of policies or procedures." (ECF No. 36-4, PageID.268). To the contrary, Annabel argues that ARF-2470 was, in fact, "false[ly] reject[ed]" as a "non-grievable" issue because his claim was grievable as an alleged violation of "Policy Directive 05.03.150, ¶ S," which states that "A Warden may prohibit a religious practice only if it is a threat to the safety, security, and good order of the

Annabel failed to timely exhaust, through the grievance process, an issue which was non-grievable to begin with. This argument clearly lacks merit.

It is well settled, and common sense, that a prisoner "cannot be required to exhaust administrative remedies regarding non-grievable issues." *Peoples v. Bauman*, No. 16-2096, 2017 WL 7050280, at *4 (6th Cir. Sept. 5, 2017) (citing *Figel v. Bouchard*, 89 F. App'x 970, 971 (6th Cir. 2004); *see also George v. Whitmer*, No. 20-12579, 2021 WL 2349319, at *5 (E.D. Mich. Apr. 13, 2021), *report and recommendation adopted*, No. 20-12579, 2021 WL 1976314 (E.D. Mich. May 18, 2021); *Reeves v. Hobbs*, 2013 WL 5462147, at *6 (W.D. Ark. Sept. 3, 2013) ("Defendants cannot treat a complaint as non-grievable, and therefore not subject to the grievance procedure, and then turn around and maintain the claim fails because [the plaintiff] failed to follow the grievance procedure. As the well known proverb states, they cannot have their cake and eat it too."). Because Defendants in this case expressly state that "the subject matter" at issue in ARF-2470 was "non-grievable," the fact that ARF-2470 was "rejected" at Step I as "untimely" is irrelevant and cannot be a basis for finding that Annabel failed to exhaust the First Amendment free exercise and RLUIPA claims raised in that grievance. Thus, Defendants' motion for summary judgment for failure to exhaust the First Amendment free exercise and RLUIPA claims should be denied.

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facility." (ECF No. 18, PageID.134; ECF No. 36-3, PageID.267). Instead of addressing this point head-on, Defendants appear to broadly maintain that ARF-2470 was properly rejected as both non-grievable and untimely. (ECF No. 43, PageID.343). However, as discussed below, Defendants fail to show that they are entitled to summary judgment under either theory.

b. Defendants Fail to Show that ARF-2470 and ARF-2531 were Properly Rejected on Procedural Grounds

As discussed above, if Annabel's First Amendment and RLUIPA claims were non-grievable, then ARF-2470 and ARF-2531 did not have to be exhausted through the three-step grievance process at all, so their rejections on procedural grounds cannot establish a failure to properly exhaust administrative remedies. But even assuming such claims were grievable, Defendants' argument lacks merit because it merely relies on the fact *that* ARF-2470 and ARF-2531 were "rejected," as opposed to a showing that those grievances were "properly rejected." *Johannes*, 2016 WL 1253266, at *6. And, careful review of the salient grievance documents makes clear that Defendants failed to carry their initial burden at the summary judgment stage to show that ARF-2470 or ARF-2531 were properly rejected in the first place.

First, as for ARF-2470, Defendants assert that the grievance was unexhausted because it was rejected as untimely. Relevant here, a copy of ARF-2470 reflects that Annabel filed a Step I grievance against Bates about an incident occurring on "10/5/19," during which he was "scheduled [to] work on-ground maintenance" even though he had requested that his "days off (Wednesdays and Thursdays) be switched to Fridays and Saturdays" because he is "forbidden from working" on the "Sabbath." (ECF No. 36-3, PageID.269). ARF-2470 lists "10/13/19" under "Today's Date," and "10-15-19" as the "Date Received at Step I." (*Id.*).

When ARF-2470 was "rejected" as "untimely" by Ream at Step I (*Id.*, PageID.270), Annabel appealed to Step II, arguing in part that "I had 2 business days to resolve and did

so on the first business day. I then had 5 business days to file the grievance. I had until the end of 10/14/19 to file but did so on Sunday, 10/13/2019." (*Id.*, PageID.267) (emphasis in original). A Step II response by Campbell states that ARF-2470 was "Recoded from 28E to 27Z as this issue is not grievable due to no violations of policies or procedures. . . . [T]he grievance rejection is upheld at Step II." (*Id.*, PageID.268). Annabel then appealed to Step III, and Russell "upheld" the rejection. (*Id.*, PageID.266).

Applying the Grievance Policy's grievance procedures to ARF-2470 makes clear that a material question of fact exists as to whether the grievance was timely filed. Specifically, ARF-2470 lists the date of incident as Saturday, "10/5/19," from which point Annabel had two business days (or until the end of Tuesday, October 8, 2019) to attempt to resolve the matter. (ECF No. 36-3, PageID.269; Grievance Policy, ¶ Q). ARF-2470 then reflects that Annabel attempted to resolve the issue with Bates with one day to spare on Monday, "10/7/2019," from which point he had five more business days, or until the end of Monday, October 14, 2019, to file ARF-2470 at Step I. (*Id.*; Grievance Policy, ¶¶ Q, W). Thus, as long as Annabel filed ARF-2470 before the end of business day on October 14, 2019, his grievance was timely under the Grievance Policy.

In his response brief, Annabel contends that he filed ARF-2470 on October 13, 2019, which is corroborated by the fact that ARF-2470 lists "Today's Date" as "10/13/19," as well as the fact that Annabel's Step II Appeal states he "had until the end of 10/14/19 to file but ***did so on Sunday, 10/13/2019***." (ECF No. 36-3, PageID.267, 269) (emphasis added). Moreover, when viewing the evidence and drawing all reasonable inferences in the light most favorable to Annabel, Grievance Policy ¶ W merely instructs that Annabel

had to timely "***send***" a completed grievance to "the Step I Grievance Coordinator designated for the facility or other office being grieved," which he apparently did with at least a full day to spare – ***by sending it on "10/13/2019."*** (*Id.*, ¶¶ Q, W) (emphasis added).

Notably, Defendants do not explain how ARF-2470 was untimely, much less dispute Annabel's proffered timeline. This alone can be construed as a waiver by Defendants of their argument. However, a review of ARF-2470 suggests that the untimeliness determination may have been premised on the "Date Received at Step I" of "10-15-19" (ECF No. 36-3, PageID.269), based on a provision in the 2019 version[8] of the Grievance Policy stating that grievances are considered "filed ***on the date received*** by the Department" (Grievance Policy, ¶ T) (emphasis added). Nonetheless, Defendants have not provided any argument disputing Annabel's contention and corroborating evidence that he complied with Grievance Policy ¶ W by sending ARF-2470 on ***October 13, 2019***. In short, there remains at least a material question of fact as to why there was a two-day delay between the date Annabel ***sent*** ARF-2470 and the date it was marked as ***received***. (*Id.*, ¶¶ Q, W). *See Dittmer v. Corizon Health, Inc.*, No. 20-12147, 2021 WL 243009, at *7 (E.D. Mich. 2021) (finding a material question of fact where "Plaintiff's date and signature [] support the inference that he sent [a Step II] appeal on [time]" and thus "would presumably have been 'received' and therefore 'filed' on time," and even if untimely filed, a material

[8] Under the 2007 version of the Grievance Policy attached to Defendants' motion, ¶ S states that "Grievances and grievance appeals at all steps shall be considered filed on ***the date sent*** by the grievant." (ECF No. 36-2, PageID.210, ¶ S) (emphasis added). Based on that outdated version, there would be no dispute that ARF-2470 was timely based on the listed sent date of "10/13/19" under "Today's Date." (ECF No. 36-3, PageID.269).

question as to "whether the delay between [the date sent] and [date received] should have been excused"). Accordingly, Defendants failed to carry their initial burden at the summary judgment stage to show that ARF-2470 was untimely.

Second, as for ARF-2531, Defendants assert that the grievance was unexhausted because it was rejected as a duplicate of ARF-2470.[9] But again, the Court rejects the illogical position that "whenever a grievance is rejected as duplicative, it is not properly exhausted as a matter of law." *See Johannes*, 2016 WL 1253266, at *6. Rather, "to carry their summary-judgment burden, Defendants must compare the issues grieved in the first grievance to those grieved in the [] allegedly-duplicate grievances and show that every reasonable jury would think the rejections were proper." *Id.* Defendants fall far short of that standard here. Indeed, ARF-2531 and ARF-2470 are not "duplicates" of each other.

Relevant here, a copy of ARF-2531 reflects that Annabel filed a Step I grievance against Bates ***and Messer***, complaining that he was scheduled to work on-ground maintenance on "***10/19/19***," even though he was "forbidden from working" on the Sabbath based on his religion, and that his request to switch his off days was ignored. (ECF No. 36-3, PageID.274) (emphasis added). Ream "rejected" ARF-2531 at Step I as a "Duplicate of [ARF-2470]." (*Id.*, PageID.275). Annabel then appealed to Step II, stating that "[t]he date of incident in [ARF-2470] was 10/5/2019 but this incident was 10/19/2019, a separate

[9] As discussed above with ARF-2470, under Defendants' position that the First Amendment free exercise and RLUIPA claims were non-grievable, Annabel would not be required to exhaust such claims in ARF-2531 through the three-step grievance process in the first place, so its rejection at Step I as a "duplicate" cannot be a basis for finding that he failed to exhaust the claims raised in that grievance.

incident []." (*Id.*, PageID.272). Campbell upheld the rejection at Step II, and Russell upheld the rejection at Step III. (*Id.*, PageID.271, 273).

Although ARF-2531 relates to the same general subject matter as ARF-2470 – that he was forced to work on the Sabbath and his requests to exchange workdays were ignored – ARF-2531 concerns an incident occurring on a different date (October 19, 2019 as opposed to October 5, 2019), and involves an additional individual in Messer (as opposed to solely Bates). Defendants do not make any arguments to the contrary, and because they fail to make any showing that ARF-2531 was a "duplicate" of ARF-2470, they cannot now use this improper rejection to claim that Annabel failed to exhaust his administrative remedies against them. *See Burnett v. Walsh*, No. 18-11063, 2020 WL 3716555, at *4-5 (E.D. Mich. June 15, 2020), *report and recommendation adopted*, No. 18-11063, 2020 WL 3639564 (E.D. Mich. July 6, 2020). Accordingly, Defendants also failed to carry their summary judgment burden to show that ARF-2531 was duplicative.

2. Failure to Exhaust Remaining Grievable Claims

Though Defendants failed to show their entitlement to summary judgment on the First Amendment free exercise and RLUIPA claims, Annabel's amended complaint also raises First Amendment retaliation claims and claims asserting that the sanctions he received under the Discipline Policy violated his rights under the First Amendment, Eighth Amendment, Fourteenth Amendment, and ADA. Defendants do not specifically address these claims, and instead broadly argue that Annabel failed to exhaust any "remaining claims." After careful review, the Court agrees that Annabel failed to exhaust these remaining grievable claims through the three-step grievance process.

a. Claims of First Amendment Retaliation

In his response brief, Annabel argues that he "clearly named [] Bates in his Step I grievance [in ARF-2470] but was not aware of the involvement of [] Ream, Evers, Messer[], Campbell, and Russell until after he had filed the Step I," and that "[a]t Step II he clearly named Ream, Evers, Messer[], and Campbell but Russell was not involved until after the Step III appeal was filed." (ECF No. 42, PageID.335). To the extent he suggests that his naming of Ream, Evers, Campbell and/or Russell at Steps II or III exhausted his retaliation claims against them, such an assertion is misguided.

Relevant here, Grievance Policy ¶ S provides that the "names of all those involved in the issue being grieved are to be included" when filing a "Step I grievance." (Grievance Policy, ¶ S). Looking at ARF-2470 and ARF-2531, it is undisputed that Annabel failed to name any defendants other than Bates and Messer, let alone allege any issue of retaliatory misconduct, at Step I of those grievances, which were rejected through all three steps on procedural grounds. Thus, the fact that Annabel subsequently named certain defendants in his Step II and III appeals is inadequate for proper exhaustion of new retaliation claims against those defendants, as the Grievance Policy required him to "name all those involved in the issue being grieved" at Step I. (Grievance Policy, ¶ S); *see Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) ("Under the Department of Corrections' procedural rules, inmates must include the '[] names of all those involved in the issue being grieved' ***in their initial grievance***.") (emphasis added); *Brown v. McCullick*, No.18-2226, 2019 WL 5436159, at *3 (6th Cir. 2019) (rejecting plaintiff's argument that "he named some of the defendants at step III of the grievance process" where he failed to name them "at step I of

this grievance, [and thus] failed to exhaust his claims against them."). The same applies to Annabel's retaliation claims against Houser and Thomas, who were not named at all.

While Annabel argues that he was "not aware" of certain defendants' retaliatory acts against First Amendment protected conduct until he received "false rejections" at Steps II and/or III, that is irrelevant as he was required to timely file a separate Step I grievance raising retaliation claims upon discovery of these alleged acts and specifically naming the individuals involved, as a violation of the Grievance Policy. (*See* Grievance Policy, ¶ K ("A grievant shall not be penalized in any way for filing a grievance . . . . Staff shall avoid any action that gives the appearance of reprisal for using the grievance process."). Because Annabel failed to do so, Defendants are entitled to summary judgment on these retaliation claims.

b. Claims regarding the Discipline Policy

In his amended complaint, Annabel also raises First Amendment, Eighth Amendment, Fourteenth Amendment, and ADA challenges based on the sanctions he received under the Discipline Policy as a result of his "Insolence" misconduct charge. (ECF No. 18, PageID.137-39). Defendants seek summary judgment on a broad argument that "Annabel did not properly exhaust any grievable claims against MDOC Defendants." (ECF No. 36, PageID.199). Defendants attach to their motion a copy of the Discipline Policy (ECF No. 36-6, PageID.292-312), and careful review of this policy makes clear that Annabel failed to exhaust these grievable claims.

First, Annabel alleges First Amendment free speech and Fourteenth Amendment due process violations against Washington. (ECF No. 18, PageID.137). Relevant here,

the Discipline Policy defines "Class II Misconducts" to include an act of "Insolence," which is defined as "Words, actions, or other behavior which is intended to harass, degrade, or cause alarm in an employee." (ECF No. 36-6, PageID.308 (Attachment B)). The Discipline Policy then lists "Common Examples" as "Using abusive language to refer to an employee; writing about or gesturing to an employee in a derogatory manner." (*Id.*). Under the Discipline Policy, "Sanctions for Class II Misconduct" include "Loss of privileges, not to exceed 30 days for all violations arising from a single incident," which may preclude a prisoner from engaging in certain activities, such as use of the activity room, exercise facilities, kitchen area, visitations, etc. (*Id.*, PageID.311 (Attachment D), PageID.312 (Attachment E)).

Based on the above provisions, Annabel asserts that the Discipline Policy is "overbroad" because "the 'Insolence' rule includes protected conduct" like "saying employees are corrupt," but also "vague" because he contends that it "failed to give him reasonable notice that complaining that an employee was 'a very corrupt defendant' constituted 'Insolence.'" (ECF No. 18, PageID.137). It is undisputed, however, that Annabel did not pursue any grievance through Step III during the relevant period that raised such challenges to the Discipline Policy. (ECF No. 18, PageID.135). Thus, the issue boils down to whether his First and Fourteenth Amendment claims were grievable under the Grievance Policy's provision that "[p]risoners and parolees are required to file grievances" unless "[t]he prisoner is grieving content of the policy or procedure ***except as it was specifically applied to the grievant.***" (Grievance Policy, ¶ J(8))(emphasis added).

Even liberally construed, a fair reading of Annabel's operative amended complaint

leads to the conclusion that his claims are as-applied challenges to the Discipline Policy, which were grievable under the Grievance Policy. (Grievance Policy, ¶ J(8); *see* ECF No. 18, PageID.136 (alleging in the amended complaint that he "had a constitutional right to criticize Ream for being a 'very corrupt defendant' and that the policy was vague and overbroad ***as applied***") (emphasis added)); *see George*, No. 20-12579, 2021 WL 2349319, at *5 ("Complaints about the 'content of a policy or procedure' are nongrievable under MDOC rules unless a prisoner is challenging how the policy was specifically applied to him."). Indeed, the gravamen of his claims is that the Discipline Policy allowed for him to be sanctioned for engaging in a specific instance of protected conduct – calling Ream a "very corrupt defendant" – without being given notice that such conduct was sanctionable as an act of "Insolence." *See Beebe v. Birkett,* 749 F. Supp. 2d 580, 587 (E.D. Mich. 2010) ("In an as-applied challenge, 'the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.'" (citing *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997)). His requested relief is also informative, as he does not seek to void the Discipline Policy or any of its provisions, but instead seeks to specifically "expunge the 'Insolence' charge" and to remove/waive the sanctions resulting from that specific charge. (ECF No. 18, PageID.139-40). Thus, Annabel raises an as-applied challenge to the Discipline Policy, and he was required to pursue a grievance through Step III. Because he failed to do so, his First and Fourteenth Amendment claims regarding the Discipline Policy should be dismissed.

Second, as to his related ADA claim, Annabel alleges that the sanctions he received

under the Discipline Policy "aggr[a]vat[ed] [his] pre-existing mental illness," and has "subject[ed]" him to "loss of privileges" without any "relief for good behavior or mental illness considerations or mitigation of past behavior from [prior] inadequate mental health treatment." (*Id.*, PageID.138-39). While his ADA claim is difficult to decipher, a liberal construction suggests that he faults Washington and Campbell for "refus[ing] to accommodate [him] with a sanctions waiver," despite the fact that his "mental illness behavioral issues" generally subject him to more discipline, and/or for failing to provide "[loss of privileges] waivers" even though his mental illness makes him "more vulnerable to suffer mental health issues from severe restrictions and isolation." (ECF No. 18, PageID.138-39). However, such claims are covered under the Discipline Policy and were therefore subject to the grievance process.

Specifically, a refusal or failure to provide sanction waivers is grievable as an alleged violation of Discipline Policy ¶ RRR, which provides, "The Warden may waive all or any part of a sanction period that has not been served by a prisoner. If the prisoner is being reclassified to general population, including for placement in any Residential Mental Health Treatment program, all of the remaining detention sanction must be waived; it cannot be waived in part." (ECF No. 36-6, PageID.302, ¶ RRR). Thus, to the extent Annabel faults Campbell for refusing or failing to waive sanctions related to his "Insolence" charge despite the fact that a waiver was warranted due to his mental illness, such claim was grievable as a violation of the Discipline Policy.

Moreover, to the extent he generally takes issue with how the Discipline Policy was applied to him as a prisoner with a mental illness, this was also grievable under Grievance

Policy ¶ J(8). *See George*, 2021 WL 2349319, at *5 (stating that a challenge to "how the policy was specifically applied to [a prisoner]" is grievable). Indeed, the Discipline Policy contains a specific section titled "Special Provisions for Prisoners with a Mental Disability," which accounts for disciplinary procedures concerning prisoners with various mental illnesses. (ECF No. 36-6, PageID.300). For instance, the Discipline Policy provides that "[a] prisoner with a mental disability is not responsible for misconduct if s/he lacks substantial capacity to know the wrongfulness of his/her conduct or is unable to conform his/her conduct to Department rules as a result of the mental disability," including "Mental illness." (*Id.*, PageID.300, ¶ DDD). Moreover, "[i]f a prisoner [] raises the issue that the prisoner may not be responsible for the misconduct due to mental disability, a request for a responsibility determination shall be directed to the Outpatient Mental Health Team if the prisoner is on their caseload or to a QMHP." (*Id.* at ¶ EEE). "If the prisoner is determined to be not responsible for his/her behavior due to his/her mental disability, the Class I or Class II Misconduct Report shall not be processed," and even "[i]f the prisoner is believed to be responsible for his/her behavior," the "misconduct shall not be processed" if it is determined to be "detrimental to the prisoner's mental health treatment needs." (*Id.* at ¶ HHH).

The above provisions make clear that, to the extent Annabel was determined to be mentally disabled, he could not be held responsible for conduct "due to mental disability [or illness]," nor receive sanctions that were "detrimental to [his] mental health treatment needs." (*Id.* at ¶¶ DDD, HHH). Thus, Annabel's broad claims that he was sanctioned despite his mental illness or that certain sanctions aggravated his mental illness were

grievable as violations of the "Special Provisions for Prisoners with a Mental Disability" outlined in the Discipline Policy. Because it is undisputed that Annabel failed to pursue any such grievances through Step III during the relevant period, his ADA claim regarding the Discipline Policy should be dismissed as unexhausted.

Finally, a similar analysis applies to Annabel's Eighth Amendment claim that "Washington and Campbell have subjected Plaintiff to cruel and unusual punishment by refusing to authorize a waiver of the loss of privileges sanctions . . . despite a period of nearly a year without misconduct (only the retaliatory 'Insolence' charge)." (ECF No. 18, PageID.137-38). As discussed above, his claim regarding a "refusal" to waive sanctions was grievable as a failure to apply sanction waivers warranted under Discipline Policy ¶ RRR (ECF No. 36-6, PageID.302, ¶ RRR), and Annabel's claims that certain sanctions caused "aggr[a]vation of pre-existing mental illness" due to "severe social isolation" and lack of "out-of-cell exercises" were grievable as violations of Discipline Policy ¶ HHH, which prevents the processing of sanctions that are determined to be "detrimental to the prisoner's mental health treatment needs." (*Id.* at ¶ HHH). Because Annabel failed to pursue any grievances bearing on these grievable issues during the relevant period, his Eighth Amendment claim regarding the Discipline Policy is unexhausted and should be dismissed.

3. Failure to State a Claim against Russell

Finally, Defendants alternatively seek dismissal of claims against Russell on the basis that "Annabel's conclusory allegations [] simply do not state a claim" because he failed to allege that "Russell [was] personally involved in the ARF incidents which form

the basis of this lawsuit." (ECF No. 36, PageID.203). Annabel responds that "Russell was directly involved in the unconstitutional decision to force Plaintiff to work or accept wages on the Sabbath days of rest when he approved and implicitly authorized those actions to continue by deeming them as a non-grievable issue." (ECF No. 42, PageID.335).

It is well established in the Sixth Circuit that the "mere denial of a prisoner's grievance states no claim of constitutional dimension." *Alder v. Corr. Med. Servs.*, 73 F. App'x 839, 841 (6th Cir. 2003); *see also Mitchell v. Caruso*, No. 09-11467, 2010 WL 727742, at *4 (E.D. Mich. 2010) ("[a] defendant is not liable under § 1983 when his or her only action was to deny an administrative grievance." (citing *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)). Here, Annabel's only allegation against Russell is that he "upheld the malicious rejection that the issue was non-grievable and that Plaintiff had no religious rights," which fails to allege any personal involvement in an alleged violation of his religious beliefs. (ECF No. 18, PageID.134). *See, e.g., Grinter v. Knight*, 532 F.3d 567, 576 (6th Cir. 2008) (the "'denial of administrative grievances or the failure to act by prison officials does not subject supervisors to liability under § 1983.'"); *Simpson v. Overton*, 79 F. App'x 117, 120 (6th Cir. 2003) ("[T]he denial of an appeal cannot in itself constitute sufficient personal involvement to state a claim for a constitutional violation."). Thus, Annabel's claims against Russell should be dismissed.

III. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED** that Defendants' Motion for Partial Summary Judgment on the Basis of Exhaustion **(ECF No. 36)** be **GRANTED IN PART AND DENIED IN PART** as discussed above. Assuming this recommendation

is adopted, Annabel's remaining claims will include only his First Amendment free exercise and RLUIPA claims, and his claim of a retaliatory misconduct ticket against Ream.

Dated: January 4, 2022
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir.1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir.1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge. A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Robert Annabel, II,

Plaintiff,

v.

Sherman Campbell, *et al.*,

Defendants.

/

Case No. 20-11114

Judith E. Levy
United States District Judge

Mag. Judge David R. Grand

OPINION AND ORDER DENYING PLAINTIFF ROBERT ANNABEL, II'S OBJECTIONS [78] AND ADOPTING IN PART THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION [77]

Pro se Plaintiff Robert Annabel, II filed four objections to Magistrate Judge David R. Grand's Report and Recommendation ("R&R"). (ECF No. 77.) The R&R recommends that the Court (1) grant the motion for summary judgment filed by Defendants Sherman Campbell, Christian Bates, Stacey Ream, and Brian Evers (ECF No. 72), and (2) deny the motion for summary judgment filed by Plaintiff. (ECF No. 68.) Judge Grand issued the R&R on September 26, 2023. (ECF No.

77.) Plaintiff timely filed four objections to the R&R (ECF No. 78), and Defendants responded to those objections. (ECF No. 79.)

For the reasons set forth below, Plaintiff's objections are denied. The Court adopts in part the R&R (ECF No. 77), grants Defendants' summary judgment motion (ECF No. 72), and denies Plaintiff's summary judgment motion. (ECF No. 68.)

I. Background

The factual and procedural background set forth in the R&R is fully adopted as though set forth in this Opinion and Order.

II. Legal Standard

A party may object to a magistrate judge's report and recommendation on dispositive motions, and a district judge must resolve proper objections under a de novo standard of review. 28 U.S.C. § 636(b)(1)(B)–(C); Fed. R. Civ. P. 72(b)(1)–(3). "For an objection to be proper, Eastern District of Michigan Local Rule 72.1(d)(1) requires parties to 'specify the part of the order, proposed findings, recommendations, or report to which [the party] objects' and to 'state the basis for the objection.'" *Pearce v. Chrysler Group LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018). Objections that restate arguments already

presented to the magistrate judge are improper, *Coleman-Bey v. Bouchard*, 287 F. App'x 420, 422 (6th Cir. 2008) (citing *Brumley v. Wingard*, 269 F.3d 629, 647 (6th Cir. 2001)), as are those that are vague and dispute the general correctness of the report and recommendation. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Moreover, objections must be clear so that the district court can "discern those issues that are dispositive and contentious." *Id.* (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)); *see also Thomas v. Arn*, 474 U.S. 140, 147 (1985) (explaining that objections must go to "factual and legal" issues "at the heart of the parties' dispute"). In sum, the objections must be clear and specific enough to permit the Court to squarely address them on the merits. *See Pearce*, 893 F.3d at 346. Because Plaintiff is self-represented, the Court will construe his objections liberally. *See Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) ("Pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings.").

III. Analysis

As stated in the R&R, Plaintiff's "only remaining claims . . . are (1) his First Amendment free exercise and RLUIPA claims against

Defendants, and (2) his First Amendment retaliation claim against defendant Ream based on her issuance of an 'Insolence' misconduct report for protected speech." (ECF No. 77, PageID.921.) The R&R recommends that Defendants' motion for summary judgment be granted as to all claims. (*Id.* at PageID.923.)

A. Objection 1

Plaintiff first objects to the R&R's determination that he "failed to raise a material question of fact" that "his ability to observe the Sabbath day of rest" was substantially burdened in violation of RLUIPA and the First Amendment. (ECF No. 77, PageID.928.) In his objection, Plaintiff argues that the R&R "misrepresents the evidence on record to falsely hold that Plaintiff presented no evidence that he was forced to accept wages on the Sabbaths."[1] (ECF No. 78, PageID.937.) He states that his verified complaint is evidence as it "carrie[s] the same weight as an affidavit." (*Id.* at PageID.937–938.) According to Plaintiff, Defendants' sole piece of evidence, Michigan Department of Corrections ("MDOC") Policy 05.03.150 ¶ AA, should not be considered evidence because it does

[1] The "weekly Sabbath," according to Plaintiff's religious belief, takes place during "sundown Friday to sundown Saturday." (ECF No. 18, PageID.132.)

not prove that "the policy was applied on a particular occasion." (*Id.*) He notes that Defendants do not present declarations to the contrary, nor records on work or prisoner trust accounts. (*Id.*) Further, Plaintiff contends that there should not be an assumption that the policy was followed because officers violated policy when they excused him from Saturday work. (*Id.* at PageID.938–939.)

Plaintiff is correct that his verified amended complaint carries the same weight as an affidavit. Plaintiff's amended complaint states, "I, Robert Annabel, II, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the foregoing facts are true." (ECF No. 18, PageID.141.) The Court finds that this is properly verified under 28 U.S.C. § 1746 as it is declared to be true under penalty of perjury. *See Colston v. Bos. Mkt. Corp.*, No. 2:17-CV-11649, 2018 WL 1404417, at *6 (E.D. Mich. Feb. 14, 2018), *report and recommendation adopted*, No. 17-11649, 2018 WL 1397862 (E.D. Mich. Mar. 19, 2018) (describing requirements for affidavits and declarations).

Plaintiff is also correct that verified complaints carry "the same weight" as affidavits for the purposes of summary judgment. *El Bey v.*

Roop, 530 F.3d 407, 414 (6th Cir. 2008).[2] Plaintiff's verified amended complaint states that "he was forced to accept wages though he does not work on [the Sabbath]." (ECF No. 18, PageID.134.) As a result, the Court will not adopt the portion of the R&R stating that "Annabel presents no *evidence* demonstrating that he was actually paid for work that he admits he was excused from and had never performed." (ECF No. 77, PageID.928.)

Nonetheless, Plaintiff still fails to raise a material question of fact in response to Defendants' motion. In Plaintiff's deposition, he states, "I was also being forced to accept wages **without work or getting paid**

[2] Affidavits (or verified complaints) submitted for summary judgment purposes must comply with Federal Rule of Civil Procedure 56(c)(4), which states, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Although Plaintiff's verified amended complaint does not outright establish his personal knowledge (ECF No. 18, PageID.134), "personal knowledge may be inferred from the content of the statements or the context of the affidavit," especially when "a close relationship exists between the affiant and the subject." *Giles v. Univ. of Toledo*, 241 F.R.D. 466, 470 (N.D. Ohio 2007). The Court assumes that Plaintiff would have personal knowledge of his prisoner account payments. Further, Defendants have not objected to the affidavit on this basis. *See* 10B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2738 (4th ed. 2023) ("[A] party must move to strike an affidavit that violates Rule 56(c)(4). The failure to do so will result in the waiver of the objection and, in the absence of a 'gross miscarriage of justice,' the court may consider the defective affidavit.").

for it. And you're not supposed to accept wages or do business on the Sabbath." (ECF No. 69-2, PageID.741 (emphasis added).) Plaintiff's contention that he was forced to accept wages is contradicted by his deposition testimony, where he states that he was not paid.

A party opposing summary judgment must make an affirmative showing that there is sufficient evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The only piece of evidence presented by Plaintiff on the issue of whether he was forced to accept wages on the Sabbath is his verified amended complaint. (ECF No. 18.) In light of Plaintiff's deposition testimony, Plaintiff has failed to establish an issue of material fact and Defendants' motion for summary judgment must be granted for this claim. *See, e.g.*, *Rizka v. State Farm Fire & Cas. Co.*, No. 13-CV-14870, 2015 WL 9314248, at *6 n.6 (E.D. Mich. Dec. 23, 2015), *aff'd*, 686 F. App'x 325 (6th Cir. 2017) (holding that plaintiff failed to create a material factual dispute when the affidavit "directly contradict[ed] [plaintiff's] later sworn deposition testimony"); *Regains v. Horrocks*, No. 2:21-CV-72, 2023 WL 5944249, at *4 (W.D. Mich. June 27, 2023), *report and recommendation adopted*, No. 2:21-CV-72, 2023 WL

5035122 (W.D. Mich. Aug. 8, 2023) ("When faced with a verified complaint that contradicts later deposition testimony, this Court credits the deposition testimony.").[3]

Finally, Plaintiff's argument that there is a "strong and reasonable inference" that MDOC Policy 05.03.150 ¶ AA was not followed in this instance is not convincing. (ECF No. 78, PageID.939.) When determining a summary judgment motion, the Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)). However, Plaintiff's own words

[3] It is not clear if Plaintiff's deposition occurred before or after he drafted the verified amended complaint because it is not clear to the Court when Plaintiff's deposition took place. (*See, e.g.*, ECF Nos. 69-2; ECF No. 72-4 (Excerpts of Plaintiff's Deposition).) Plaintiff filed a motion to amend his complaint on February 12, 2021 (ECF No. 18), and it was granted on June 21, 2021. (ECF No. 33.) Because the Court's scheduling order was entered on October 12, 2022 (ECF No. 50), the Court assumes that the deposition took place after Plaintiff's verified amended complaint was submitted. However, even if the deposition took place before Plaintiff's verified amended complaint, the Court still credits the deposition testimony. *See, e.g., Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 906 (6th Cir. 2006) ("[A] party cannot create a disputed issue of material fact by filing an affidavit that contradicts the party's earlier deposition testimony."). Moreover, Plaintiff's statement in his verified amended complaint does not say unequivocally that he was actually paid any wages for work he did not perform.

in his deposition testimony establish that he was not paid. (ECF No. 69-2, PageID.741.)

Thus, Plaintiff's first objection is denied.

B. Objection II

Because Plaintiff is a *pro se* litigant, the Court construes his second objection as disputing the R&R's determination that Plaintiff's RLUIPA and First Amendment Free Exercise claims should be dismissed. The R&R states, "Annabel failed to raise a material question of fact that his merely being *scheduled* to work certain Saturday assignments meets the 'high' threshold of establishing that Defendants 'substantially burdened' his ability to observe the Sabbath day of rest." (ECF No. 77, PageID.928–929.)

Plaintiff argues that he "does not have to fully yield to substantial pressure by actually violating his religious beliefs to state a claim." (ECF No. 78, PageID.939.) Plaintiff believes that it is "sufficient that he was under the looming threat of disciplinary action placing substantial pressure on him to [violate his religious beliefs]." (*Id.* at PageID.939–940.) Citing *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), he states, "[t]he Supreme Court did not

hold as an element of a free exercise claim that a plaintiff must actually violate his belief." (ECF No. 78, PageID.939–940.)

There are three steps in a RLUIPA analysis. "[T]he inmate must demonstrate that he seeks to exercise religion out of a 'sincerely held religious belief,'" and "the inmate must show that the government 'substantially burdened that religious exercise.'" (ECF No. 77, PageID.925 (quoting *Calvin v. Mich. Dep't of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019)).) If the inmate can satisfy these first two steps, "the burden shifts to the government to show that (1) the imposition of the substantial burden on an inmate's religious exercise was 'in furtherance of a compelling governmental interest,' and (2) it used 'the least restrictive means of furthering that compelling governmental interest.'" (*Id.* (quoting 42 U.S.C. § 2000cc-1(a)(1)–(2)).) Here, the R&R determined that Plaintiff did not present sufficient evidence of a substantial burden. (*Id.* at PageID.928.)

"The Government substantially burdens an exercise of religion under RLUIPA when it places substantial pressure on an adherent to modify his behavior and to violate his beliefs or effectively bars his sincere faith-based conduct." *Ackerman v. Washington*, 16 F.4th 170, 184

(6th Cir. 2021) (quoting *Fox v. Washington*, 949 F.3d 270, 278 (6th Cir. 2020)) (internal quotation marks omitted). Such violations occur when a prisoner is forced to choose between "'engaging in conduct that seriously violates his religious belief' or 'facing serious disciplinary action' or fines." *Id.* at 184 (quoting *Holt v. Hobbs*, 574 U.S. 352, 351). Further, the burden must be substantial; "[n]ot all government-imposed burdens satisfy the test." *Id.* at 185 (citing *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1003 (6th Cir. 2017)).

It is undisputed that Plaintiff "was never actually ordered or required to work on a single Saturday during the relevant period, and that each time, when he asked not to work on the Sabbath based on his religious beliefs, he was promptly excused with permission." (ECF No. 77, PageID.926.) Plaintiff maintains that he presented sufficient evidence of a substantial burden because he "was still at risk of disciplinary action if Defendants found out [that he was not working on Saturdays] or that officers might occasionally enforce Defendants[']' application of policy." (ECF No. 78, PageID.940.) Plaintiff argues that he was "under the looming threat of disciplinary action" (*id.*), even though it is undisputed that he never was reprimanded or threatened with

punishment. (ECF No. 77, PageID.927.) Further, Plaintiff claims that Defendants "plainly declare that there would be no work exceptions for Plaintiff's religious beliefs had they known that non-defendants were [excusing him from work on Saturdays]." (*Id.* at PageID.941.)

After a careful review, the Court has not found any support for the premise that excusals without reprimands or threats of punishment are considered a "substantial burden" on one's religious beliefs. (*See* ECF No. 78, PageID.939–941.) Plaintiff has not presented any case law demonstrating such a view.

Plaintiff's reliance on *Thomas* is not convincing. While it is true that the plaintiff in *Thomas* never engaged in conduct that violated his religious beliefs, unlike Annabel, he was punished for refusing to do so. *Thomas*, 450 U.S. at 710 (describing review board's finding that the plaintiff was not entitled to benefits). Here, there is no evidence that Annabel was punished or threatened with punishment.[4] As stated in the

[4] Plaintiff also states that "Defendants have admitted at the summary judgment stage and during discovery that it was their intent to apply MDOC in such a way as to threaten Plaintiff to substantial disciplinary action had they known that he was refusing to work on the Sabbath as scheduled." (ECF No. 78, PageID.940.) Plaintiff does not point to evidence in the record to support this statement. Further, even if Defendants had admitted this, Plaintiff's objection must still be denied because Plaintiff has not shown a substantial burden on his faith.

R&R, Plaintiff "was never actually *ordered* to work on Saturdays," and he presented no evidence that "he was ever actually reprimanded to any extent, or actually threatened with a misconduct ticket, for not working on the Sabbath." (ECF No. 77, PageID.928.)

Thus, Plaintiff's second objection is denied.

C. Objection III

In Plaintiff's third objection, he argues that "Defendants were personally involved in continuing violations of Plaintiff's religious rights." (ECF No. 78, PageID.941.) Plaintiff appears to object to the R&R's third footnote, which states that "aside from defendant Bates who was responsible for assigning Annabel to work on Saturdays, Annabel failed to present evidence that the remaining Defendants were directly involved in managing his work assignments." (ECF No. 77, PageID.929 n.3.) The R&R concludes that "Annabel's RLUIPA and Free Exercise claims against Defendants other than Bates would also fail as a matter of law in this regard." (*Id.* at PageID.929–930 n.3.)

Plaintiff's third objection is denied because the section of the R&R objected to is not "dispositive and contentious." *Miller*, 50 F.3d at 380 (6th Cir. 1995) (citing *Howard*, 932 F.2d at 505). Even if Plaintiff's objection

was correct, his RLUIPA and Free Exercise claims against Defendants Campbell, Ream, and Evers still fail for the reasons set forth in the R&R and in this Order. (ECF No. 77, PageID.924–929.)

Plaintiff's third objection is denied.

D. Objection IV

In Plaintiff's fourth objection, he discusses the R&R's recommendation that Defendants' motion for summary judgment be granted as to Plaintiff's First Amendment retaliation claim. He maintains that he "engaged in protected conduct by honestly complainting [sic] that Defendant Ream is 'a very corrupt defendant.'" (ECF No. 78, PageID.945.) He objects that the R&R's "reliance on *Lockett* [*v. Suardini*, 525 F.3d 866 (6th Cir. 2008)] is misplaced" because of differences in fact (ECF No. 78, PageID.946), and reiterates that the Court should follow the reasonings in *Wilson v. Greetan*, 571 F. Supp. 2d 948 (W.D. Wis. 2007), and *Brown v. Crowley*, 312 F.3d 782 (6th Cir. 2002). (ECF No. 78, PageID.945–946.) Plaintiff also believes that the "public-concern" test should be applied here and that the R&R "failed to consider the truthfulness of Plaintiff's statement that Ream was corrupt." (*Id.* at PageID.946.) Finally, Plaintiff writes,

> The R&R speculates that it was not Plaintiff's intent that his statement that Ream was being sued for her corruption was not intended to deter Ream's corruption. The evidence also does not support that Ream did not have a retaliatory motive, as Plaintiff's truthful statement was not insolent.

(*Id.* at PageID.946–947.)

As detailed in the R&R, the "prima facie case for First Amendment retaliation involves three elements: '(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two–that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.'" (ECF No. 77, PageID.930 (quoting *Thaddeux-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999).) The R&R determined that Plaintiff's claim fails at the first element, as "his comment to Ream was not protected conduct under *Thaddeus-X*." (*Id.* at PageID.933.) Further, the R&R found that Plaintiff had not overcome Defendant's qualified immunity defense, as Plaintiff "fails to point to any clearly established holding of the Supreme Court or Sixth Circuit recognizing that a prisoner calling an officer a derogatory name is protected conduct, such that the officer's subsequent issuance of an

'Insolence' misconduct report as defined under policy would clearly constitute an unlawful act of retaliation violating the First Amendment." (*Id.* at PageID.935.)

Plaintiff's objection does not address the core of the R&R's reasoning: that "defendant Ream is entitled to qualified immunity on Annabel's retaliatory misconduct claim against her." (*Id.*) When applied, qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). If the defendant raises the affirmative defense of qualified immunity, it is then the plaintiff's burden to show that the defendant is not entitled to a qualified immunity defense. *Guertin v. State*, 912 F.3d 907, 917 (6th Cir. 2019).

To meet this burden, a plaintiff must show "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Both factors must be satisfied for a court to find that the defendant is not entitled to qualified

immunity. *See Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). "Plaintiffs must generally identify a case with a fact pattern similar enough to have given 'fair and clear warning to officers' about what the law requires." *Guertin*, 912 F.3d at 932. Usually, the right must be clearly established by existing Supreme Court or Sixth Circuit precedent. *Id.* ("[T]here must either be 'controlling authority or a robust consensus of cases of persuasive authority.'" (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 780 (2014))).

Even if Plaintiff's constitutional rights were violated, he has not shown any evidence that these rights were clearly established at the time of the violation. Plaintiff's argument that the Court should rely on *Brown* and *Wilson* is not convincing.[5] *Wilson*, which is "an out-of-circuit district court case," has no precedential authority over the Court and could not put Defendant on notice that her conduct violated a constitutional right. (ECF No. 77, PageID.934 (citing *Wilson*, 571 F. Supp. 3d 948).) Additionally, *Brown* is inapplicable here; the court in *Brown* did not

[5] To the extent that Plaintiff argues that the Court should follow the holdings in *See v. City of Elyria*, 502 F.3d 484 (6th Cir. 2007), and *Mayhew v. Town of Smyrna*, 856 F.3d 456 (6th Cir. 2017), his argument is denied. Neither case involves prisoners and cannot demonstrate a violation of clearly established law because they are not sufficiently similar.

conduct this analysis because the parties agreed that the plaintiff engaged in protected conduct. *Brown*, 312 F.3d at 789. Here, however, Defendant argues that Plaintiff has not established the first element of a retaliation claim because his kite to Ream was not protected conduct.

The Court finds that the R&R's reliance on *Lockett* was correct. The Court agrees with Plaintiff that his statement, "You are a very corrupt defendant," (ECF No. 68, PageID.598), does not contain profanities as the statement in *Lockett* did. (ECF No. 78, PageID.945.) However, *Lockett*'s holding is still applicable here: that "a prisoner who violates a legitimate prison regulation is not engaged in protected conduct." (ECF No. 77, PageID.932 (citing *Lockett*, 526 F.3d 866).) To the extent that Plaintiff argues that the public concern test should be applied, his argument is rejected. (*See* ECF No. 78, PageID.946.) *Lockett* "declined to address the 'open question' of whether the public-concern test applied to prisoner speech." (ECF No. 77, PageID.935 (citing *Lockett*, 526 F.3d at 874).) Thus, Plaintiff has not overcome Defendant's qualified immunity defense.

Plaintiff attempts to demonstrate that his kite to Defendant Ream was protected conduct because it was truthful and cites *Brown v. Crowley*. (ECF No. 78, PageID.946.) As stated before, *Brown v. Crowley*

is inapplicable here, as the parties in that case agreed that the grievance was non-frivolous, and that the plaintiff had engaged in protected conduct. *Brown*, 312 F.3d at 789. Here, the parties are not in agreement. Though Plaintiff states that "[t]here is evidence on record that [Defendant Ream] had falsely rejected Plaintiff's grievances and had an astronomical rejection rate of prisoners' grievances as a whole," he has not shown where such evidence is located. (ECF No. 78, PageID.946.) On the contrary, Defendant Ream provided an affidavit detailing the legitimate reasons she issued this misconduct report for "Insolence" and Plaintiff has not provided any evidence to the contrary.[6] (See ECF No. 77, PageID.931 n.4.)

Thus, Plaintiff's fourth objection is denied.

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[6] Plaintiff's verified complaint carries the same weight as an affidavit. *El Bey*, 530 F.3d at 414. However, "[c]onclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009). Plaintiff's verified complaint only offers conclusory statements about the truth of his statement, Ream's motivations, and his statement as protected speech. (*See, e.g.*, ECF No. 18, PageID.135 ("Plaintiff complained in a kite to Defendant Ream: 'You are a very corrupt defendant.' This is a true statement of both Campbell and Ream as protected speech that placed them on notice that Ream was also being sued.").) Thus, Plaintiff has not offered any evidence to the contrary.

IV. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motion for summary judgment. (ECF No. 72.) Plaintiff's motion for summary judgment (ECF No. 68) is DENIED. The R&R (ECF No. 77) is ADOPTED IN PART.

IT IS SO ORDERED.

Dated: March 4, 2024
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or first-class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 4, 2024.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ANNABEL, II,

Plaintiff,

Civil Action No. 20-11114

v.

Judith E. Levy
United States District Judge

SHERMAN CAMPBELL, *et al.*,

David R. Grand
United States Magistrate Judge

Defendants.
_____/

REPORT AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF No. 68), AND TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF No. 72)

Pro se plaintiff Robert Annabel, II ("Annabel"), an incarcerated person, brings this civil rights action pursuant to 42 U.S.C. § 1983, against MDOC employees Sherman Campbell, Christina Bates, Stacey Ream, and Brian Evers (collectively, "Defendants"). (ECF No. 1). The case was referred to the undersigned for all pretrial matters pursuant to 28 U.S.C. § 636(b). (ECF No. 23).

On April 21, 2023, Annabel filed a motion for summary judgment (ECF No. 68), which has been fully briefed (ECF Nos. 69, 74). On May 19, 2023, Defendants filed their own motion for summary judgment (ECF No. 72), which has also been fully briefed (ECF Nos. 75, 76).

The Court finds that the facts and legal issues are adequately presented in the briefs and on the record, and it declines to order a hearing at this time. *See* E.D. Mich. LR 7.1(f).

I. RECOMMENDATION

For the reasons set forth below, **IT IS RECOMMENDED** that Annabel's Motion for Summary Judgment **(ECF No. 68)** be **DENIED**, and Defendants' Motion for Summary Judgment **(ECF No. 72)** be **GRANTED**.

II. REPORT

A. Brief Factual Background

Annabel is an MDOC inmate who, at all relevant times, was confined at the Gus Harrison Correctional Facility ("ARF") in Adrian, MI. He brings this § 1983 civil rights action, alleging violations of his rights under the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA"). Following the Court's prior rulings, Annabel's only remaining claims in his operative amended complaint are (1) his First Amendment free exercise and RLUIPA claims against Defendants, and (2) his First Amendment retaliation claim against defendant Ream based on her issuance of an "Insolence" misconduct report for protected speech.

The Court previously detailed the relevant allegations in Annabel's amended complaint as follows:

> . . . Annabel alleges a series of events stemming from his assignment to a weekly work detail during the Sabbath by Corrections Program Coordinator Christina Bates ("Bates") in September 2019, which allegedly violated his religion and led to his filing a grievance. (ECF No. 18, PageID.132-33). As a result, Annabel asserts that, "in a conspiracy to continue the violations of [his] free exercise rights," Warden Sherman Campbell ("Campbell"), [] Grievance Coordinator Stacey Ream ("Ream"), [and] Assistant Deputy Warden Brian Evers ("Evers") . . . subjected him to a series of retaliatory "harassment and corruption" through "malicious effort[s] to obstruct the grievance process" by

"falsely reject[ing]" his grievance and "threaten[ing] to retaliate if [Annabel] continued to file grievances." (*Id.*, PageID.133-35). . . .

Specifically, Annabel alleges that his "religion is a form of Christianity that observes the weekly Sabbath [from] sundown Friday to sundown Saturday," during which "no work must be done, nor wages received." (*Id.*, PageID.132). However, in September 2019, Bates allegedly "assigned [Annabel] an on-grounds maintenance work detail" for "Fridays and Saturdays." (*Id.*, PageID.132-33). After several "failed attempts" to "exchange" his scheduled workdays during the Sabbath with his usual days off on "Wednesdays and Thursdays," Annabel "wrote a grievance." (*Id.*, PageID.133). According to Annabel, "[t]here was no legitimate penological interest or even a compelling governmental interest behind denying his request." (*Id.*).

Starting from this point, Annabel allegedly became the target of a "conspiracy to continue the violations of [his] free exercise rights." (*Id.*). He alleges that, in "a malicious effort to obstruct the grievance process," Ream and Evers "falsely rejected the grievance at Step I" without addressing it "on the merits," even though he "clearly followed the grievance policy." (*Id.*). Ream and Evers "also threatened to retaliate if [he] continued to file grievances by placing him on Modified Grievance Access for 3 months." (*Id.*, PageID.133-34).

When Annabel appealed "the grievance to Step II," Campbell allegedly "changed the obviously false rejection to a new false rejection for non-grievable issue, claiming that Plaintiff has no religious rights under MDOC policy or the Constitution." (*Id.*, PageID.134). He then appealed "the grievance to Step III," at which point Russell "upheld the malicious rejection that the issue was non-grievable and that Plaintiff had no religious rights." (*Id.*). Annabel alleges that, throughout "2019 and 2020," Campbell and Ream "began another campaign of retaliatory harassment by falsely rejecting any grievance alleging unconstitutional conditions, . . . [and] repeatedly threatened Plaintiff with Modified Grievance Access." (*Id.*, PageID.135).

Annabel further alleges that, when "the harassment and corruption continued," he sent a kite to Ream on April 17, 2020, stating, "You are a very corrupt defendant," which he contends was a "true statement of both Campbell and Ream as protected speech." (*Id.*). In response, Ream issued Annabel a "Class II Insolence misconduct charge," violating his "right to criticize her for being corrupt and that such was being litigated." (*Id.*). [Sergeant] Houser reviewed the misconduct ticket on April 20th, but despite Annabel's explanation that the ticket "was retaliation for protected speech, not insolence," Houser failed to "quash the ticket" and instead stated that "Campbell and Ream would write more tickets if he continued to complain or file grievances." (*Id.*, PageID.136).

> . . . On April 24th, [Resident Unit Manager] Thomas held a misconduct hearing and, with "retaliatory motive and intent," found Annabel guilty. (*Id.*). Annabel then filed "a misconduct appeal," which Campbell "denied [] personally." (*Id.*).
>
> * * * * * * * * *
>
> Based on the above allegations, Annabel sues the Defendants "in their personal capacities for alleged violations of the Constitution, but in their official capacities for RLUIPA [] claims." (*Id.*, PageID.132). . . . Annabel seeks, among other relief, monetary damages, and injunctive relief to stop being forced to "work or accept wages on the Sabbath days" and to "expunge the 'Insolence' charge" and waive the related sanctions stemming from that charge. (*Id.*, PageID.139-40).

Annabel and Defendants have now filed cross motions for summary judgment. For the reasons discussed below, the Court finds that Defendants are entitled to summary judgment on all of Annabel's claims against them.

B. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, the Court will grant summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Pittman v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 640 F.3d 716, 723 (6th Cir. 2011). A fact is material if it might affect the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact exists, the Court assumes the truth of the non-moving party's evidence and construes all reasonable inferences from that evidence in the light most favorable to the non-moving party. *See Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion and must identify particular portions of the record that demonstrate the absence of a genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In response to a summary judgment motion, the opposing party may not rest on its pleadings, nor "'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in order to defeat the motion." *Alexander*, 576 F.3d at 558 (internal quotations omitted).

C. Analysis

1. RLUIPA and First Amendment Free Exercise Claims

At the heart of this case is Annabel's claim that Defendants unconstitutionally infringed on his "rights to freedom of religion by attempts to force him to work and accept wages on the weekly Sabbath days from sundown Friday to sundown Saturday."[1] (ECF No. 68, PageID.583). Defendants argue that Annabel "fails to state a RLUIPA claim" because he "did not allege a substantial burden" on his religious beliefs, and for the same

[1] While Annabel makes a passing reference to "sundown Friday" in his complaint, there is no evidence in the record that he was ever assigned or ordered to work after "sundown" on Fridays, and the only issue appears to be whether he was required to work on Saturdays.

reasons, also "cannot establish that any Defendant violated his First Amendment rights." (ECF No. 72, PageID.843; ECF No. 69, PageID.725).

RLUIPA provides "expansive protection" for prisoners' religious liberty. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). Indeed, "[c]ourts have recognized that, in the prison context, RLUIPA provides greater protections than the First Amendment." *Fox v. Washington*, 949 F.3d 270, 277 (6th Cir. 2020). Analysis under RLUIPA is a "three-act play." *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019). First, the inmate must demonstrate that he seeks to exercise religion out of a "sincerely held religious belief,"[2] and second, the inmate must show that the government "substantially burdened that religious exercise." *Id.* If the inmate satisfies the first two steps, the burden shifts to the government to show that (1) the imposition of the substantial burden on an inmate's religious exercise was "in furtherance of a compelling governmental interest," and (2) it used "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(1)-(2); *Fox*, 949 F.3d at 282.

In determining what constitutes a "substantial burden" on religious exercise, the Sixth Circuit has stated that prison officials who place "substantial pressure on an adherent to modify his behavior and to violate his beliefs, [] or 'effectively bar' his sincere faith-

[2] Defendants mention in passing that "[a]rguably, [Annabel's] complaint does not establish the necessary facts regarding his religious belief[s], or that the beliefs are sincerely held . . ." (ECF No. 72, PageID.829). Instead, they argue that "one thing is certain – [Annabel] was not forced to work in violation of those beliefs." (*Id.*). While the Court need not formally address whether Annabel established that observing the Sabbath day of rest is a requirement of his religious beliefs, it is worth noting that "[s]o long as the practice is traceable to a sincerely held religious belief, [] it does not matter whether the inmate's preferred exercise is 'central' to his faith." *Haight*, 763 F.3d at 559-60 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005), and 42 U.S.C. § 2000cc-5(7)(A)).

based conduct ... [] necessarily place a substantial burden on it." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (citing *Hayes v. Tenn.*, 424 F. App'x 546, 555 (6th Cir. 2011), and *Living Water Church of God v. Charter Twp. of Meridian*, 285 F. App'x 729, 739 (6th Cir. 2007)). "In the 'Free Exercise' context, the Supreme Court has made clear that the 'substantial burden' hurdle is high and that determining its existence is fact intensive." *Living Water Church of God*, 258 F. App'x at 734. (". . . Congress has cautioned that we are to interpret 'substantial burden' in line with the Supreme Court's 'Free Exercise' jurisprudence, which suggests that a 'substantial burden' is a difficult threshold to cross.").

To determine whether Annabel has presented sufficient evidence of a "substantial burden" to his religious exercise, it is necessary to first determine the actual "burden" Defendants imposed on his ability to observe the Sabbath day of rest. As best as can be discerned, Annabel's claim is that Defendants substantially burdened his religious requirement to rest on the Sabbath day by *scheduling* him to work on Saturdays for ground maintenance duties, even though he is prohibited from working or accepting wages on the Sabbath. However, even viewing the record evidence in the light most favorable to Annabel, the evidence is undisputed that Annabel was never actually ordered or required to work on a single Saturday during the relevant period, and that each time, when he asked not to work on the Sabbath based on his religious beliefs, he was promptly excused with permission. Annabel makes this clear in his own deposition testimony:

> Q: Okay. ***So you did work on some Saturdays?***
>
> A: ***No; no. I asked to be excused. I was granted leave to be excused.***
>
> Q: Okay. So when you say you would be excused, would you arrive

> to work and then ask to leave?
>
> A: ***Basically they would call me out of my cell. I'd go up to the base and I would ask the officer not to work that day because of my religious beliefs and they'd say, "Okay. That's fine." And they let me go back to my cell*** . . . So I didn't get in a trap like I could have got into.
>
> * * * * * * * * * *
>
> Q: Okay. . . . So each [] Saturday you would go through the same process. You would go to work, ask to be released for your religious beliefs and they'd say, "Okay," and you went back to your cell?
>
> A: ***I wouldn't – I wouldn't have to come out unless they called me out.***
>
> Q: Okay. ***And there were some Sabbaths that they didn't call you out?***
>
> A: ***Most time they didn't call me out because they didn't have no work for me; right?*** I mean, there's no reason why I was required to have that day assigned when most of the time there wasn't any work to do anyhow.

(ECF No. 69-2, PageID.740-41) (emphasis added).

Moreover, to the extent Annabel's claim is based on the premise that he *could have* been issued a misconduct ticket or otherwise punished for refusing to work on his scheduled workdays, the evidence establishes that he was always excused without reprimand when requested:

> Q: [] Now, as far as this work assignment goes, I think the way your Complaint reads [a]s if you actually did refuse to work on the Sabbath; is that correct?
>
> A: ***There's a couple of times I refused to work, but I wasn't written a ticket for it. They understood and gave me the option again.*** . . .

(*Id.*, PageID.740) ("I'd go up to the base and I would ask the officer not to work that day

because of my religious beliefs and they'd say, 'Okay. That's fine.' And they let me go back to my cell . . . So I didn't get in a trap like I could have got into."). Indeed, he makes clear in his own motion for summary judgment that he was never actually *ordered* to work on Saturdays. (ECF No. 68, PageID.595) ("Had Plaintiff refused an order to work on the Sabbath ***(fortunately the order never came)***, he would have been issued a Class II misconduct charge...") (emphasis added). Annabel also fails to present any evidence that he was ever actually reprimanded to any extent, or actually threatened with a misconduct ticket, for not working on the Sabbath.

As to Annabel's contention that his claim is "twofold" because he was also being "forced to accept wages" on the Sabbath, such contention is conclusory as he presents no *evidence* demonstrating that he was actually paid for work that he admits he was excused from and had never performed. The Court notes that MDOC Policy 05.03.150 ¶ AA makes clear that "[p]risoners released from a work or school assignment to attend group religious services or holy day observances ***will not be paid for their absence from the assignment***" (ECF No. 69-3, PageID.746) (emphasis added), and Annabel presents no evidence that this policy was not followed with respect to the Sabbath days he did not work.

Based on all of the foregoing undisputed evidence, Annabel failed to raise a material question of fact that his merely being *scheduled* to work certain Saturday assignments meets the "high" threshold of establishing that Defendants "substantially burdened" his ability to observe the Sabbath day of rest. Again, Annabel was never ordered to work on such days, and never actually did work on such days. At most, Annabel showed that being scheduled for certain Saturday work assignments was a "mere inconvenience" on his

religious exercise, which falls far short of the "substantial burden" he was required to show to advance his RLUIPA claims. *See Living Water Church of God*, 258 F. App'x at 739 (stating that a "substantial burden" must place more than a "mere inconvenience" on religious exercise); *see also Haight*, 763 F.3d at 565 (same).

Accordingly, Defendants are entitled to summary judgment on Annabel's RLUIPA claims. And, because summary judgment should be granted on his RLUIPA claims, it follows that summary judgment should be also granted for Defendants on Annabel's First Amendment Free Exercise claims, as "[c]ourts have recognized that, in the prison context, RLUIPA provides greater protections than the First Amendment." *Fox*, 949 F.3d at 277; *see Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010) ("The constitutional protection afforded under § 1983 is less strong, however [than RLUIPA]."); *Smith v. Li*, 599 F. Supp. 3d 706, 709-10 (M.D. Tenn. 2022) ("Congress enacted RLUIPA to ensure greater protection for religious exercise than is available under the First Amendment.").[3]

[3] It is also worth noting that, aside from defendant Bates who was responsible for assigning Annabel to work on Saturdays, Annabel failed to present evidence that the remaining Defendants were directly involved in managing his work assignments. Instead, Annabel faults them for denying his grievances on the issue or otherwise failing to act. Specifically, Annabel asserts that Ream and Evers "attempted to cause the ongoing religious violation to continue by falsely rejecting two of Plaintiff's grievances," and that Campbell "rejected the first grievance as a non-grievable issue." (ECF No. 68, PageID.595). Such allegations are insufficient to state a § 1983 claim, however, because the "mere denial of a prisoner's grievance states no claim of constitutional dimension," and because "liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon a mere failure to act." *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); *Alder v. Corr. Med. Servs.*, 73 F. App'x 839, 841 (6th Cir. 2003); *Mitchell v. Caruso*, No. 09-11467, 2010 WL 727742, at *4 (E.D. Mich. 2010) ("[a] defendant is not liable under § 1983 when his or her only action was to deny an administrative grievance."); *Grinter v. Knight*, 532 F.3d 567, 576 (6th Cir. 2008) (the "'denial of administrative grievances or the failure to act by prison officials does not subject supervisors to liability under § 1983.'"); *Simpson v. Overton*, 79 F. App'x 117, 120 (6th Cir. 2003) ("[T]he denial of an appeal cannot in itself constitute sufficient personal involvement to state a claim for a constitutional violation."). Thus, Annabel's RLUIPA

2. First Amendment Retaliation Claim against Defendant Ream

Annabel next argues that he sent Ream a kite requesting a Step II appeal form and stating: 'You are a very corrupt defendant,'" and that Ream "retaliated by issuing [him] a misconduct charge under a vague and capricious application of a rule against 'Insolence.'" (ECF No. 68, PageID.598). A prima facie case for First Amendment retaliation involves three elements: "(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999).

The record evidence reflects that, on April 16, 2020, Annabel sent a kite to Ream stating, in its entirety, "You are a very corrupt defendant. I demand a Step II Appeal form for ARF/20/04/701/272." (ECF No. 69-7, PageID.776). Ream subsequently issued Annabel a Class II misconduct report for "Insolence" based on the following reason: "Annabel [] sent a kite to me that stated, 'You are a very corrupt defendant[.]' This statement was made to harass and degrade this writer." (ECF No. 68-1, PageID.698). A misconduct hearing was subsequently held, during which Annabel argued that calling Ream "very corrupt" in response to her "corrupt grievance practices" was protected conduct, and that he would not have been issued the misconduct report if he "hadn't used the word 'defendant' to place Ream on notice that [he] filed a lawsuit against her . . ." (*Id.*,

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and Free Exercise claims against Defendants other than Bates would also fail as a matter of law in this regard.

PageID.700). Hearing Officer Thomas ultimately found Annabel guilty of "Insolence," determining that "[t]he word defendant is not the word that caused the writer to feel degraded or harassed but the word 'corrupt' instead. This derogatory statement is a deformation of the writers [sic] character and fit the definition of Insolence. I find the writer's statement credible." (*Id.*, PageID.699).

In his motion, Annabel argues that Ream's issuance of an "Insolence" misconduct report in response to the above kite constituted unlawful retaliation against his protected speech "to complain that Ream was corrupt and that she was a defendant in a lawsuit."[4] In her own summary judgment motion, Ream argues that she is entitled to qualified immunity on Annabel's retaliatory misconduct ticket claim against her because Annabel failed to establish that her issuing him a valid "Insolence" misconduct report pursuant to MDOC Policy for his use of "insulting" and "derogatory" terms to "simply attack[] [her] character"

[4] To the extent Annabel argues that Ream issued him a misconduct report in retaliation for his notifying her that he was *filing a lawsuit* against her by calling her a "defendant," such claim would fail because he does not present evidence that would create a material factual question that Ream's issuance of the "Insolence" misconduct report was motivated by his filing a lawsuit rather than his calling her "very corrupt." *See, e.g.*, *Edwards v. Valdez*, No. 1:22-CV-1059, 2023 WL 2674195,at *4 (W.D. Mich. Mar. 29, 2023). As detailed above, the salient misconduct documents in the record consistently establish the precise reason that Ream issued Annabel a misconduct report for "Insolence," which is that she believed he called her "corrupt" for no other reason than to degrade and harass her. Ream provides an additional affidavit corroborating that reason, elaborating that she issued the "Insolence" misconduct report because his statement "calling [her] corrupt" served "no valid purpose" other than to "degrade or harass" her because such statement "was not attempting to resolve an issue," was not "asking [her] to clarify why [she] rejected his grievance," or was not even "expressing his belief that he felt [she] was repeatedly or falsely rejecting his grievances." (ECF No. 69-6, PageID.769). Annabel fails to provide any evidence disputing Ream's proffered reasons such that it would create a material factual question as to whether Ream issued him the misconduct report for a different reason altogether, *i.e.*, based on his notifying her of a lawsuit by calling her a "defendant" in his kite to her. Annabel's own self-serving speculation as to Ream's motives is insufficient. *Alexander*, 576 F.3d at 558.

was a constitutional violation, much less a violation of clearly established law. (ECF No. 72, PageID.832-41). After careful review, the Court agrees that Annabel failed to meet his burden to show that Ream's issuance of a misconduct report for "Insolence" in response to him calling her a "very corrupt defendant" amounts to a violation of clearly established law.

In *Lockett v. Suardini*, an inmate raised a similar First Amendment retaliation claim, arguing that he was unlawfully retaliated against for calling a MDOC officer a "foul and corrupted bitch," which he asserted was protected speech "under the public-concern test." *Lockett*, 526 F.3d 866, 868-71, 874 (6th Cir. 2008). In affirming the district court's grant of summary judgment on behalf of the MDOC, the Sixth Circuit explained that it need not address the "open question" of whether the "public-concern test" applied to speech by prisoners because it was well established that a prisoner who violates a legitimate prison regulation is not engaged in protected conduct:

> Lockett admits that he called Hearing Officer Maki a "foul and corrupted bitch." The threshold question is therefore whether that comment was "protected conduct" under the first prong of the *Thaddeus-X* test.
>
> MDOC contends that Lockett's comment was not protected because it constituted "insolent" behavior in violation of MDOC's disciplinary regulations. Lockett did not respond to this argument, asserting instead that his speech was protected under the public-concern test. MDOC correctly notes that whether the public-concern test determines the protection to be afforded a prisoner's speech is an open question in the Sixth Circuit. In *Thaddeus–X*, this court sitting *en banc* specifically refused to make a "determination about the appropriateness of explicitly applying the public-concern limitation to speech by prisoners." Nor do we need to decide that issue here, because the court held in *Thaddeus-X* that "if a prisoner violates a legitimate prison regulation, he is not engaged in 'protected conduct,' and cannot proceed beyond step one"

> of the three-step retaliation analysis.
>
> MDOC Policy Directive No. 03.03.105 provides that "insolent" behavior is a "major misconduct" violation. Such behavior is defined as "[w]ords, actions, or other behavior which is intended to harass, degrade, or cause alarm in an employee." Lockett's comment that the hearing officer was "a foul and corrupted bitch" was insulting, derogatory, and questioned her authority as well as the integrity of the proceeding. It thus falls well within the definition of "insolence" under the MDOC Policy Directive. Accordingly, Lockett's First Amendment claim fails as a matter of law because his comment to the hearing officer was not protected conduct under *Thaddeus–X.*

Lockett, 526 F.3d at 874 (citations omitted).

In Annabel's instant case, MDOC Policy Directive 03.03.105 likewise classifies "Insolence" as a Class II Misconduct defined as "[w]ords, actions or other behavior, which is intended to harass, degrade or cause alarm in an employee," such as "[u]sing abusive language to refer to an employee" or "writing about [] an employee in a derogatory manner." (ECF No. 69-8, PageID.796). While Annabel's statement to Ream was not as vulgar as the comments made in *Lockett*, his calling Ream "very corrupt" was similarly "derogatory, and questioned her authority as well as [her] integrity" and "thus falls well within the definition of 'insolence' under the MDOC Policy Directive." *Lockett*, 526 F.3d at 874. As the Sixth Circuit determined in *Lockett*, Annabel's First Amendment claim here fails as a matter of law because his comment to Ream was not protected conduct under *Thaddeus-X. Id.*

Annabel's primary reliance on *Wilson v. Greetan*, 571 F. Supp. 3d 948 (W.D. Wis. 2007), and *Brown v. Crowley*, 312 F.3d 782 (6th Cir. 2002), as establishing clearly established precedent of a constitutional violation is misplaced. (*See* ECF No. 68,

PageID.597-98; ECF No. 75, PageID.897-99). First, both *Wilson* and *Brown* were issued *before* the Sixth Circuit's published decision in *Lockett*, which made clear that, while it was an "open question" in the Sixth Circuit whether the "public-concern test" applied to speech by prisoners, a prisoner's speech violating the MDOC's Policy on "Insolence" is "not protected conduct under *Thaddeus–X*."[5] *Lockett*, 526 F.3d at 874. Second, *Wilson* is an out-of-circuit district court case with no precedential authority that would call into question the Sixth Circuit's holding in *Lockett*. *See Siggers v. Alex*, 2023 WL 5986603, at *4 (6th Cir. Sept. 12, 2023) ("In evaluating the state of the law . . . we consider Supreme Court and Sixth Circuit precedent."). Finally, *Brown* is factually distinguishable from Annabel's case, as *Brown* did not involve the use of derogatory speech resulting in a charge of "Insolence," but rather involved an inmate's complaints notifying prison officials of the alleged embezzlement of inmate funds, for which the inmate was charged with "interference with the administration of rules." *Brown*, 312 F.3d at 785.

In short, the Sixth Circuit in *Lockett* affirmatively held that speech qualifying as "insolent" in violation of MDOC Policy was not protected conduct under *Thaddeus-X* as a

[5] Subsequent caselaw in the Sixth Circuit has continued to follow this same principle. *See, e.g.*, *Griffin v. Berghuis*, 563 F. App'x 411, 415 (6th Cir. 2014) ("[T]o the extent that Griffin invokes the Free Speech Clause, the general rule—that a prison inmate's speech is not protected by the First Amendment if it is "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system"—governs his claims"); *Annabel v. Michigan Dep't of Corr.*, 2018 WL 3455407, at *17 (W.D. Mich. July 18, 2018) ("The Sixth Circuit has recognized that behavior that violates prison rules is not conduct protected by the First Amendment."); *Stradley v. Michigan Dep't of Corr.*, 2015 WL 6758826, at *4 (W.D. Mich. Nov. 5, 2015) ("Plaintiff's insolence toward[] [officer] Blake was not protected conduct"), *aff'd*, No. 15-2537, 2016 WL 11848704 (6th Cir. Aug. 30, 2016); *Edwards*, 2023 WL 2674195, at *3 ("[C]ourts have held that a prisoner's act of calling an officer an offensive name or making other offensive statements toward an officer does not constitute protected conduct.").

matter of law, and it otherwise declined to address the "open question" of whether the public-concern test applied to prisoner speech. *Lockett*, 526 F.3d at 874. Annabel, who bears the burden to overcome qualified immunity, fails to point to any clearly established holding of the Supreme Court or Sixth Circuit recognizing that a prisoner calling an officer a derogatory name is protected conduct, such that the officer's subsequent issuance of an "Insolence" misconduct report as defined under policy would clearly constitute an unlawful act of retaliation violating the First Amendment. *See Beaton v. City of Allen Park*, 2015 WL 3604951, at *10 (E.D. Mich. Jun. 8, 2015) (stating that a plaintiff bears the burden to show "a constitutional right was violated and that the right was clearly established at the time of the violation.") (quotations omitted).

Accordingly, defendant Ream is entitled to qualified immunity on Annabel's retaliatory misconduct claim against her, and such claim should be dismissed.

III. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED** that Annabel's Motion for Summary Judgment **(ECF No. 68)** be **DENIED**, and Defendants' Motion for Summary Judgment **(ECF No. 72)** be **GRANTED**.

Dated: September 26, 2023
Ann Arbor, Michigan

s/David R. Grand
DAVID R. GRAND
United States Magistrate Judge

NOTICE TO THE PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir.1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir.1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir.1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge. A party may respond to another party's objections within 14 days after being served with a copy. *See* Fed. R. Civ. P. 72(b)(2); 28 U.S.C. §636(b)(1). Any such response should be concise, and should address specifically, and in the same order raised, each issue presented in the objections.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on September 26, 2023.

s/Eddrey O. Butts
EDDREY O. BUTTS
Case Manager

APPENDIX D

No. 24-1322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT ANNABEL II,

Plaintiff-Appellant,

v.

SHERMAN CAMPBELL, Warden, et al.,

Defendants-Appellees,

DAVID MESSER,

Defendant.

ORDER

BEFORE: STRANCH, MURPHY, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

*Judge Davis is recused in this case.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Robert Annabel, II,

Plaintiff,

v.

Sherman Campbell, *et al.*,

Defendants.

/

Case No. 20-cv-11114

Judith E. Levy
United States District Judge

Mag. Judge David R. Grand

ORDER DENYING PLAINTIFF'S RULE 60(b)(6) MOTION FOR RELIEF FROM JUDGMENT [51]

Before the Court is *pro se* Plaintiff Robert Annabel, II's "motion for relief of judgment" under Federal Rule of Civil Procedure 60(b)(6). (ECF No. 51.) For the reasons set forth below, Plaintiff's motion is DENIED.

I. Background

On July 13, 2021, Defendants Sherman Campbell, David Messer, Christina Bates, Stacey Ream, Brian Evers, Richard Russell, Mark Houser, Arthur Thomas, and Heidi Washington filed a motion for partial summary judgment on the basis of exhaustion. (ECF No. 36.) Magistrate Judge David R. Grand issued a Report and Recommendation (R&R) that

recommended granting in part and denying in part Defendants' motion. (ECF No. 44, PageID.373.) On September 29, 2022, the Court adopted the R&R. (ECF No. 48.) Plaintiff's "First Amendment free exercise and RLUIPA [Religious Land Use and Institutionalized Persons Act] claims, and his claim of a retaliatory misconduct ticket against Ream" are now the only remaining claims in the case. (ECF No. 44, PageID.374.)

On October 14, 2022, Plaintiff filed a motion under Federal Rule of Civil Procedure 60(b)(6) for relief from judgment. (ECF No. 51.) Plaintiff's motion states that

> [t]his Court allowed the free speech/retaliation claim against Defendant Ream but provided no explanation why that same claim was dismissed as to Defendants Houser, Thomas, and Campbell. This is the only issue for which Plaintiff now files this Rule 60(b) motion for relief of judgment.
>
> * * *
>
> It is unclear why this Court's Order (ECF No. 48) allowed the free speech/retaliation claim against Defendant Ream to proceed, but dismissed the same claim against Defendants Houser, Thomas, and Campbell for supposed failure of Plaintiff to exhaust administrative remedies for that same non-grievable issue. Plaintiff was only required to appeal the misconduct decisions, not file a grievance.

(*Id.* at PageID.423–424.)

Rule 60(b)(6) applies to final judgments. Because a final judgment has not been entered in this case, the Court construes Plaintiff's motion as a motion for reconsideration of a non-final order under Local Rule 7.1(h)(2), in deference to Plaintiff's *pro se* status.

II. Legal Standard

"A party may move for reconsideration of a non-final order under Local Rule 7.1(h)(2)." *Burn Hookah Bar, Inc. v. City of Southfield*, No. 2:19-cv-11413, 2022 WL 730634, at *1 (E.D. Mich. Mar. 10, 2022). That rule provides:

> Motions for reconsideration of non-final orders are disfavored. They must be filed within 14 days after entry of the order and may be brought *only* upon the following grounds:
>
> (A) The court made a mistake, correcting the mistake changes the outcome of the prior decision, and the mistake was based on the record and law before the court at the time of its prior decision;
>
> (B) An intervening change in controlling law warrants a different outcome; or
>
> (C) New facts warrant a different outcome and the new facts could not have been discovered with reasonable diligence before the prior decision.

E.D. Mich. LR 7.1(h)(2). "A motion for reconsideration is 'not an opportunity to re-argue a case' and/or 'to raise [new] arguments which could, and should, have been made' earlier." *Bills v. Klee*, No. 15-cv-

11414, 2022 WL 447060, at *1 (E.D. Mich. Feb. 14, 2022) (alteration in original) (quoting *Sault Ste. Marie Tribe v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)).

III. Analysis

In his motion, Plaintiff does not argue that there is "[a]n intervening change in controlling law" or "[n]ew facts that would warrant a different outcome" such that he is entitled to relief under Local Rule 7.1(h)(2)(B) or (h)(2)(C). He states that the Court "provided no explanation why [the free speech/retaliation] claim was dismissed as to Defendants Houser, Thomas, and Campbell" but not dismissed as to Ream. (ECF No. 51, PageID.423.) This argument appears to fall under Local Rule 7.1(h)(2)(A). However, Plaintiff does not show that the Court made a mistake in its order adopting the R&R.

Plaintiff's argument fails as to his free speech claim because that claim was brought only against Defendant Washington and not Ream, Houser, Thomas, or Campbell. Plaintiff's argument about his retaliation claim also lacks merit. In its order, the Court did not need to consider Plaintiff's retaliation claim against Ream because Defendants conceded in their motion for partial summary judgment that Plaintiff properly

exhausted this claim. (ECF No. 36, PageID.198–199 ("MDOC Defendants will concede that Annabel exhausted claims arising out of the Annabel's [sic] claim that Ream issued him a retaliatory misconduct ticket . . . Annabel's remaining claims are therefore unexhausted and subject to dismissal.").) The R&R acknowledged this by stating that "Defendants argue that they are entitled to summary judgment on all but one claim of a retaliatory misconduct ticket against Ream." (ECF No. 44, PageID.352.)

The R&R found that Plaintiff failed to exhaust his claims with respect to the other Defendants including Houser, Thomas, and Campbell. (*Id.* at PageID.365–367.) The R&R reasoned that

> [t]o the extent [Plaintiff] suggests that his naming of Ream, Evers, Campbell and/or Russell at Steps II or III exhausted his retaliation claims against them, such an assertion is misguided.
>
> Relevant here, Grievance Policy ¶ S provides that the "names of all those involved in the issue being grieved are to be included" when filing a "Step I grievance." (Grievance Policy, ¶ S). Looking at ARF-2470 and ARF-2531, it is undisputed that Annabel failed to name any defendants other than Bates and Messer, let alone allege any issue of retaliatory misconduct, at Step I of those grievances, which were rejected through all three steps on procedural grounds. Thus, the fact that Annabel subsequently named certain defendants in his Step II and III appeals is inadequate for

> proper exhaustion of new retaliation claims against those defendants, as the Grievance Policy required him to "name all those involved in the issue being grieved" at Step I. (Grievance Policy, ¶ S); *see Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) ("Under the Department of Corrections' procedural rules, inmates must include the '[] names of all those involved in the issue being grieved' ***in their initial grievance***.") (emphasis added); *Brown v. McCullick*, No.18-2226, 2019 WL 5436159, at *3 (6th Cir. 2019) (rejecting plaintiff's argument that "he named some of the defendants at step III of the grievance process" where he failed to name them "at step I of this grievance, [and thus] failed to exhaust his claims against them."). The same applies to Annabel's retaliation claims against Houser and Thomas, who were not named at all.
>
> While Annabel argues that he was "not aware" of certain defendants' retaliatory acts against First Amendment protected conduct until he received "false rejections" at Steps II and/or III, that is irrelevant as he was required to timely file a separate Step I grievance raising retaliation claims upon discovery of these alleged acts and specifically naming the individuals involved, as a violation of the Grievance Policy. (*See* Grievance Policy, ¶ K ("A grievant shall not be penalized in any way for filing a grievance . . . . Staff shall avoid any action that gives the appearance of reprisal for using the grievance process."). Because Annabel failed to do so, Defendants are entitled to summary judgment on these retaliation claims.

(*Id.* at PageID.366–367.) Based this analysis, the Court adopted the R&R's recommendation to grant Defendant's motion for partial summary judgment with respect to the retaliation claim against all Defendants

except Ream. (ECF No. 48, PageID.407–408, 412.) Thus, an explanation was provided as to why the free speech and retaliation claims were dismissed as to Houser, Thomas, and Campbell. Plaintiff is therefore incorrect that the Court did not provide reasoning for its decision on the retaliation claim. Plaintiff is not entitled to relief under Local Rule 7.1(h)(2) because he has not demonstrated that the Court made a mistake.

IV. Conclusion

For the reasons set forth above, Plaintiff's motion for relief from judgment (ECF No. 51) is DENIED.

IT IS SO ORDERED.

Dated: December 1, 2022
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or first-class U.S. mail addresses disclosed on the Notice of Electronic Filing on December 1, 2022.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager