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United States District Court, S.D. New York.

Thomas HIGGINS, Plaintiff,
v.
Philip COOMBE, Jr., Acting Commissioner of the New York Department of Correctional Services (DOCS); Glenn Goord, Deputy Commissioner of Facility Operations (DOCS); D. Selsky, Director of Special Housing (DOCS); C. Artuz, Superintendent of Greenhaven Correctional Facility; L. Portuondo, First Deputy Superintendent; C. Coefield, Dep. Sup't of Security; D. Bliden, Dep. Sup't of Programs; T. Bushek, Dep. Sup't of Administration; G. Haponik, Steward; G. Blaetz, Senior Counselor; Sally Kapland, Senior Counselor; Snyder, Captain Security; Naggy, Lieutenant Security; Cottington, Sergeant Security; Whitney, Sergeant Security; R. Murphy, Correction Officer; Surber, Correction Officer; John Doe, Correction Officer; Correspondence Department Employees, Defendants.

No. 95 CIV. 8696(SS). | June 16, 1997.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

SOTOMAYOR

***1** Plaintiff, Thomas Higgins, a prisoner at Attica Correctional Facility, brings this action pro se under 42 U.S.C. § 1983, alleging that defendants retaliated against him for filing prior lawsuits against Greenhaven prison officials.[1] Plaintiff's Complaint is prolix, consisting of over forty handwritten pages and over sixty attached exhibits. However, the crux of the Complaint alleges that defendants retaliated against him by altering his employment status at the facility, by tampering with his legal mail and other communications which denied him access to the courts, and by filing false misbehavior reports against him. Plaintiff seeks monetary damages and injunctive relief. Defendants move to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons to be discussed, defendants' motion is granted in part and denied in part.

THE STANDARD OF REVIEW: DISMISSAL UNDER RULE 12(b)(6)

Motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) are designed to test the legal sufficiency of a plaintiff's claims. In construing such a motion, I must accept all material facts alleged in the Complaint as true and must draw all reasonable inferences in plaintiff's favor. *See Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Hertz Corp. v. City of New York,* 1 F.3d 121, 125 (2d Cir.1993), *cert. denied,* 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994). I may not dismiss plaintiff's Complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see Hishon v. King & Spaulding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). In deciding a Rule 12(b)(6) motion, I may consider only those matters contained in the Complaint, the documents attached thereto, and matters of which I may take judicial notice.

Despite this liberal rule of pleading, it is well settled in lawsuits alleging a violation of constitutional rights that "a Complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of [a civil right], fails to state a cause of action under Rule 12(b)(6)." *Martin v. N.Y. State Dep't of Mental Hygiene,* 588 F.2d 371, 372 (2d Cir.1978); *see also Wright v. Santoro,* 714 F.Supp. 665, 668 (S.D.N.Y.) (*pro se* Complaint's vague and conclusory allegations are legally insufficient), *aff'd,* 891 F.2d 278 (2d Cir.1989).

THE STANDARD OF REVIEW: RETALIATION CLAIMS

The Second Circuit has recognized that prison officials may not retaliate against prisoners for exercising their constitutional rights. *Colon v. Coughlin,* 58 F.3d 865, 872 (2d Cir.1995). However, the Court has also recognized "the ease with which claims of retaliation may be fabricated, [and the need to] ... examine prisoners' claims of retaliation with care." *Colon,* 58 F.3d at 871 (*citing Flaherty v. Couglin,* 713 F.2d 10, 13 (2d Cir.1983).) A plaintiff alleging retaliation "bears the burden of showing that the conduct at issue was constitutionally protected

and that the protected conduct was a substantial or motivating fact in the prison officials' decision to discipline plaintiff." *Graham v. Henderson,* 89 F.3d 75, 79 (2d Cir.1996) (*citing In Mount Healthy Sch. Dist. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).)

***2** Where these claims may have merit the prisoners making them must be accorded the full procedural and substantive safeguards available to other litigants. *Colon,* 58 F.3d at 872. "[A] retaliation claim supported by specific and detailed factual allegations which amounts to a persuasive case ought to be pursued with full discovery. However, a Complaint which alleges retaliation in wholly conclusory terms may be safely dismissed on the pleadings alone.... A third category of allegations also exists, namely a Complaint which alleges facts giving rise to a colorable suspicion of retaliation. Such a claim will support at least documentary discovery." *Flaherty,* 713 F.2d at 13; *accord Colon,* 58 F.3d at 872.

DISCUSSION

Unfortunately, defendants' motion papers do not address all of the incidents of retaliation presented by plaintiff in this Complaint. However, before granting plaintiff's motion, I must address and rule upon every possible claim plaintiff may be making in this Complaint. *Burgos v. Hopkins,* 14 F.3d 787, 790 (2d Cir.1994) (court is to read a pro se party's "supporting papers liberally and ... interpret them to raise the strongest possible arguments that they suggest".) I have culled the following eight incidents of alleged retaliation from plaintiff's Complaint.

1. PRISON JOB ASSIGNMENT

On September 21, 1994, plaintiff returned from St. Francis Hospital to Greenhaven Correctional Facility after an operation performed on plaintiff's achilles tendon. Prior to his hospitalization, plaintiff was employed at the facility in the position of Inmate Liaison Representative. Plaintiff alleges that defendants Sally Kapland and Ginny Blaetz designated plaintiff as "medically unemployable" because of his injury and subsequent hospitalization. Plaintiff contested this designation and maintains that defendants, including Superintendent Artuz, "have consistently failed to correct the error." Complaint at 8. Plaintiff, however, "continued to do his assignment as an I.L.C. representative for D–Block and attend an Executive meeting with the staff as such in October...." Complaint at 8. Plaintiff's allegations against Blaetz and Kapland make no mention of retaliation for plaintiff's exercise of any constitutionally protected right. Furthermore, plaintiff's designation as "medically unemployable," by his own admission, did not interfere with his work as Inmate Liaison Representative. As such, plaintiff fails to state a claim against Blaetz and Kapland in alleging that they designated him as medically unemployable.

Plaintiff also claims that he has been "continually harassed in his position on the Inmate Liaison Committee by [defendants] forcing him to attend G.E.D. classes although he had his High School Diploma, G.E.D. and college he obtained while incarcerated and cut his pay." Complaint at 37. Prison inmates have no constitutional right to a particular prison assignment or to a specific wage while incarcerated in a correctional facility. *Moody v. Daggett,* 429 U.S. 78, 88, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976); *Gill v. Mooney,* 824 F.2d 192, 194 (2d Cir.1987); *Salahuddin v. Coughlin,* 674 F.Supp. 1084, 1054 (S.D.N.Y.1987). By reverse implication, plaintiff has no constitutional right *not* to participate in institutional programming.

***3** Acts of retaliation, however, are actionable under § 1983 if they violate First Amendment rights. *See, e.g., Franco v. Kelly,* 854 F.2d 584, 590 (2d Cir.1988) (an act in retaliation for the exercise of a constitutional right is actionable under § 1983). Plaintiff alleges a retaliatory motive: "it was due to his [plaintiff's] exercising his First Amendment rights, speaking out against their abuses and petitioning the Courts that the constitutional violations of the 5th, 8th and 14th Amendment occurred." Complaint at 37.

Retaliation claims are subject to the well-established standard that even in a pro-se civil rights action, vague and conclusory allegations are insufficient to state a cause of action. *Flaherty,* 713 F.2d at 13 ("[A] [§ 1983] complaint which alleges retaliation in wholly conclusory terms may be safely dismissed on the pleadings alone."); *see also Barr v. Abrams,* 810 F.2d 358, 363 (2d Cir.1987) (complaints relying on civil rights statutes insufficient unless they contain some specific allegations).

Here, plaintiff's one sentence statement that his placement in the G.E.D. Program were in retaliation for exercising protected rights is impermissibly vague and conclusory. Plaintiff has presented the Court with no evidence or allegation to further to support this insubstantial contention. On the contrary, plaintiff has provided the Court with a non-retaliatory motive for these acts: plaintiff explains that forcing prisoners to attend GED classes and cutting pay "has been an ongoing occurrence with many of the prisoners in an effort to fraudulently fill the class rooms to maintain the jobs of the employees on their staff. This has resulted in many state lawsuits." Complaint at 37. As plaintiff has not presented the Court with violations of constitutional magnitude or evidence of retaliation, this claim is also dismissed.

2. MISSING § 1983 APPENDIX in *Higgins v. Artuz,* No. 96 Civ. 4810(SS) (S.D.N.Y.1996)

Plaintiff also claims that prison officials tampered with his legal mail by removing an Appendix from a sealed envelope accompanying plaintiff's § 1983 civil rights complaint. Plaintiff argues that although the complaint reached the Court and was assigned a judge and docket number, the accompanying Appendix did not. On September 29, 1994, Carolyn Cairns Olson, Assistant Attorney General, sent the Court a letter, copied to plaintiff, and indicated that "[t]he *pro se* complaint in this action refers to numerous exhibits in an 'Appendix.' An Appendix, however, was not served upon this office, or upon any of the defendants in this action, with the summons and complaint ... The Clerk suggested that it may be in Chambers." Exhibit 19. Plaintiff subsequently wrote the Court responding to Ms. Olson's letter. Plaintiff's inquiry was forwarded to Richard Wilson, a clerk in this Court's Pro Se Office for response. Exhibit 28.

By letter dated November 8, 1994, Mr. Wilson responded to plaintiff's inquiry:

> ***4** In your letter you state that this office did not send you the appendices you submitted with your complaint, so that you could serve copies on the defendants. However, upon review of the complaint submitted, it appears as though there might be some confusion on your part. The complaint you submitted has a Table of Contents, which lists the various parts of the "complaint." When this office received your papers, we separated the following documents from the complaint and they were filed separately: Order to Show Cause and Temporary Restraining Order, Motion to Proceed In Forma Pauperis and Assignment of Counsel, Affidavit of In Forma Pauperis and Assignment of Counsel and an Order of Forma Pauperis and Assignment of Counsel ... Should you have any further questions please contact the undersigned.

Plaintiff concedes that the § 1983 Complaint that accompanied the Appendix did reach the Court. Complaint at 34. Nevertheless, plaintiff alleges that D. Bliden, Deputy Superintendent; T. Bushek, Dep. Sup't of Administration; Gail Haponik and other unnamed corrections officers working in conjunction with R. Wilson of the Pro Se Office conspired to retaliate against him by removing the Appendix from the envelope mailed to this Court containing plaintiff's Complaint. Complaint at 29. In their motion papers, defendants argue generally that "plaintiff's access to the courts was not hampered or impacted upon, even if his court papers were misplaced." Memorandum at 8.

Prison inmates have a well established constitutional right to petition the government for redress of their grievances, which includes the right of reasonable access to courts. *Hudson v. Palmer,* 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983); *see also Bounds v. Smith,* 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). "In order to state a valid § 1983 claim on this ground, the inmate must allege facts tending to show that the alleged deprivation actually interfered with his or her access to the courts, or prejudiced an existing action." *Jermosen v. Coughlin,* 877 F.Supp. 864, 871 (S.D.N.Y.1995); *accord Herrera v. Scully,* 815 F.Supp. 713, 725 (S.D.N.Y.1993). The "actual injury" requirement for a denial of access to the courts is "more than just any type of frustrated legal claim." *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 2181, 135 L.Ed.2d 606 (1996). The injury must go to the plaintiff's ability to "attack their sentences, directly or collaterally, and in order to challenge the conditions of confinement." *Id.* A plaintiff must show how the destruction of documents could have impeded any suit that he had or could have brought. *Hikel v. King,* 659 F.Supp. 337, 340 (E.D.N.Y.1987). Delays in communicating with the courts or in the ability to work on a legal action does not rise to the level of a constitutional violation. *Jones v. Smith,* 784 F.2d 149, 151–52 (2d Cir.1986).

Plaintiff's allegation, that the Appendix appended to Complaint No. 96 Civ. 4810 was removed by prison officials before mailing, is nothing more than speculation, unsupported by any concrete factual allegations. It is seemingly implausible that prison officials, intent on preventing plaintiff from filing a § 1983 lawsuit, would open plaintiff's mail, remove the Appendix, but then forward the Complaint to the court. Indeed, plaintiff expresses his own doubts regarding this contention in his Affirmation: "[I]t is probable to a certain extent that the Pro–Se Clerk's Office removed the appendixes...." Affirmation at 4. In addition, the letter from R. Wilson, a former staff member in the Pro Se Office of this Court, points to the possible solution to this issue when he states that the "appendix," consisting of certain documents unrelated to the allegations in the Complaint, was received by the Court and separated from the Complaint itself. The fact that the Complaint was filed with the Court belies plaintiff's allegation that prison officials prevented his access to the court. Therefore, plaintiff has not shown, and cannot show, that he was denied access to the Court by the named prison officials for removing his Appendix and this claim against them is dismissed.

3. EMERGENCY TELEPHONE CALL

***5** On November 15, 1994, plaintiff attempted to make "an emergency telephone call" to the Court to discuss the missing Appendix. Complaint at 15. Plaintiff's basis for requesting this "emergency" telephone call was the statement in R. Wilson's November 8, 1994 letter stating, "[s]hould you have any further questions, please contact the undersigned." Plaintiff apparently interpreted this statement as a demand to contact the Court by telephone. Plaintiff's request was initially thwarted because the facility was "shut down for security reasons." Plaintiff was told to put his request into writing. His written request was subsequently denied. Plaintiff argues that he "demonstrated a necessity for a legal telephone call, showing [ ] the letter of the Pro–Se Clerk, R. Wilson, stating that if I had any further questions to call." Complaint at 23. Defendants do not address this claim in their motion papers.

This allegation must also be dismissed. P. Nelson, Senior Counselor,[2] responded to plaintiff's request to call the Court by stating, "[t]he document that you supplied does not request that you be given a call to the court." Exhibit 39. I agree with Mr. Nelson's observation that the Letter from the Court's Pro Se Office in no way supports plaintiff's argument that he was entitled to an emergency phone telephone call. In addition, there are no facts to support plaintiff's allegation that his legal mail was not being forwarded by the facility which might thereby justify an emergency telephone call. Indeed, utilizing the mail as his means of communication, plaintiff, then and now, continues to actively litigate both of his pending cases. Plaintiff has made no showing that he has been harmed by defendant Nelson's refusal to let plaintiff make a call only he described as an "emergency." As such, all claims against defendant P. Nelson are dismissed.

4. MISSING POLICE REPORT

Plaintiff next alleges that unnamed defendants conspired to retaliate against him by removing police reports he had attached as an exhibit to a habeas corpus petition which plaintiff had prepared for filing in this Court. Plaintiff maintains that the reports were stolen from his cell in retaliation for filing the lawsuit, 94 Civ. 4810, that named Correction Officer Wildrick[3] as a defendant. Plaintiff believes that Officer Wildrick might have taken the reports. When confronted by plaintiff, Officer Wildrick denied having possession of the reports. Complaint at 12. As further evidence of retaliation, plaintiff alleges that although he reported the incident, "the complaint was not logged that day and all the preceding events demonstrates a consciousness of guilt on the officer's [Wildrick's] part."

Because plaintiff alleges no actual injury from Officer Wildrick's purported conduct, this claim must be dismissed. Plaintiff specifically alleges in his Complaint that on November 3, 1994, he went to the law library and recopied the police reports and that on November 4, 1994, he mailed out the habeas petition, which was received by the Court on November 14, 1994. Further, plaintiff's allegation that the petition was given to prison officials for mailing on November 4, 1994 and not "received" by the Court until ten days later, is of no moment inasmuch as there is no indication or allegation that plaintiff suffered actual injury or prejudice as a result.

5. LOST LEGAL DOCUMENTS

***6** Plaintiff was transferred to Wende Correctional Facility on January 19, 1995. Plaintiff claims generally that defendants Bliden, Haponik, Bushek and Surber were "responsible for the disappearance of a bag and a half of legal work. This was maliciously accomplished because plaintiff filed the instant suit." Complaint at 35. Plaintiff maintains that two bags containing legal materials and documents were to be sent to his mother "for safe keeping." Instead, the bags were sent to his brother, also at Wende and, "after seeing the contents and reviewing the I.S. 64 form, plaintiff realized that the contents of the bag were part of two (2) full bags of legal documents from his and his brothers criminal case, i.e. transcripts, police reports, and documentation he had signed to be sent to his mother." Affirmation at 9. However, the legal documents were missing from the bags and have not been recovered. Plaintiff alleges that defendants Coombe and Artuz "were notified, but failed, or adequately failed to respond and/or investigate plaintiff's claims in their supervisory capacities." Affirmation at 9.

Plaintiff also charges defendant Surber with "maliciously" removing important legal materials from luggage he packed in preparation for his transfer to Wende Correctional Facility. Plaintiff alleges that defendant Surber altered the I.S. 64 inventory form that contained the list of his itemized property. As a result of this action, plaintiff contends that he is unable "to litigate within his criminal Habeas Corpus proceeding in the Eastern District Federal Court."[4] Affirmation at 10.

This allegation is sufficient to survive dismissal under the liberal pleading standards of Fed.R.Civ.P. 12(b)(6). Whether the deprivation of these legal documents prejudiced plaintiff's ability to litigate a habeas action and ultimately caused actual injury cannot be resolved by the instant motion. Plaintiff has pled the possible violation of a substantive constitutional right. *Morello v. Smith,* 810 F.2d 344 (2d Cir.1986). Defendants' motion to dismiss this claim against correction officer Surber, therefore, is denied. However, as plaintiff has not pled the personal

involvement of any of the other named defendants, the claim as against defendants Coombe, Artuz, Bliden, Haponik and Bushek is dismissed. *See infra* at pp. 25–26.

6. CELL SEARCH ALLEGATIONS

Plaintiff alleges that, on November 17, 1994, "the institutional search team headed by defendants Captain Snyder and Lieutenant Naggy searched D Block housing area." Complaint at 15. Four other individuals, defendants Surber, Murphy, Cottington and a John Doe correction officer searched plaintiff's cell. Although all of the cells on D Block were searched that evening, plaintiff asserts that the search of his cell was retaliatory in nature and was undertaken to create a false misbehavior report against plaintiff. As evidence, plaintiff contends that he was the only prisoner ordered to face the wall until the search was completed. However, when plaintiff objected, the correction officers permitted him to turn around.

***7** Plaintiff maintains that the defendants turned his cell upside down, confiscating many of plaintiff's belongings as contraband, including magazines, lamps, a typewriter, coffee, creamer, sugar, eating utensils, legal binders and looseleaf notebooks. In addition to the above items designated as contraband, the corrections officers found a hidden razor blade that plaintiff contends was placed in the cell by the officers to fabricate a false misbehavior report. Complaint at 21.

As evidence of retaliatory conduct, plaintiff points to alleged racist remarks made by the officers and the fact that the search of plaintiff's cell took longer and was more thorough than others. However, when plaintiff later complained about the condition of his cell after the search, a correction officer, "grinned and remarked that everyone['s] cell had been left the same way." Complaint at 23. Plaintiff alleges that defendants conducted a cell search in retaliation for plaintiff's suit against Correction Officer Wildrick.

The Supreme Court has held that prisoners do not have a legitimate expectation of privacy in their individual cells. *Hudson v. Palmer,* 468 U.S. 517, 525–26, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). Searches of cells implicate no protected constitutional rights, even if the search is arbitrary or retaliatory in nature. *Hudson,* 468 U.S. at 527; *see Payne v. Axelrod,* 871 F.Supp. 1551, 1555 (N.D.N.Y.1995); *Demaio v. Mann,* 877 F.Supp. 89, 95 (N.D.N.Y.1996). *But see Lowrance v. Coughlin,* 862 F.Supp. 1090, 1098 (S.D.N.Y.1994) ("a range of retaliatory conduct in reaction to a prisoner's exercise of constitutionally protected rights has long been established as unconstitutional by courts of this circuit.") (*citing Jones v. Coughlin,* 696 F.Supp. 916, 920 (S.D.N.Y.1988).) I dismiss all claims against correction officers Snyder and Naggy, the defendants responsible for the search of D Block.

Further, any claim plaintiff may be making for the destruction of personal property must also be dismissed. A claim for deprivation of property does not lie in federal court if the state courts provide an adequate remedy for the deprivation of that property. *Hudson,* 468 U.S. at 533; *Parratt v. Taylor,* 451 U.S. 527, 54243, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds,* 474 U.S. 327, 330–31, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Marino v. Ameruso,* 837 F.2d 45, 47 (2d Cir.1988). New York provides such a remedy in § 9 of the New York Court of Claims Act which permits an inmate to pursue a claim for deprivation of property against the State of New York in the New York Court of Claims. *See Demaio,* 877 F.Supp. at 95. Because New York State provides an adequate post-deprivation remedy for destruction of his property, plaintiff may not pursue this claim as a § 1983 action in this Court.

7. RETALIATORY FALSE MISBEHAVIOR REPORT

Plaintiff alleges that, as a result of the cell search, defendants fabricated a false misbehavior report against him in retaliation for his suit naming correction officer Wildrick as a defendant. As evidence of retaliation, plaintiff asserts that during the cell search, defendants were "singing and speaking that they were protecting and avenging the honor of a loved one ... I was later informed that they allegedly found a weapon." Plaintiff claims that the items confiscated were authorized and not contraband and that the razor was "planted." Affirmation at 7.[5] Plaintiff further maintains that he was "set-up with [these] false disciplinary charges ... by defendants Snyder, Naggy, Cottington, Whitney, Murphy, Surber and John Doe." Defendant correction officer Whitney allegedly "endorsed" the false misbehavior report. Affirmation at 5.

***8** Plaintiff also alleges that close inspection of the misbehavior report indicates that the report was altered: "[i]f you notice it would seem, as in most cases, from the upper left hand corner that the review officer intended to make both a tier II disciplinary, however the report was escalated to a tier III by someone else." Complaint at 24. This claim is without any basis in fact and is unconnected to the action of any particular defendant. It is, therefore, dismissed.

However, " '[a]lthough the filing of unfounded charges d[oes] not give rise to a per se constitutional violation action under section 1983,' *Freeman v. Rideout,* 808 F.2d 949, 953 (2d Cir.1986), *cert. denied,* 485 U.S. 982, 108 S.Ct. 1273, 99 L.Ed.2d 484 (1988), the Second Circuit has held that a § 1983 claim may stand when the false charges are allegedly brought in retaliation for an inmate's exercise of his substantive due process rights,

see Franco v. Kelly, 854 F.2d 584, 589–90 (2d Cir.1988).” *Rodriguez v. Phillips,* 66 F.3d 470, 477 (2d Cir.1995).

Claims of retaliation must be examined with skepticism and care, *Flaherty,* 713 F.2d at 13, and a plaintiff’s broad and unsubstantiated allegations of retaliation will not defeat a motion for summary judgment. However, plaintiff’s allegations here are sufficient to bring plaintiff’s claim within the purview of § 1983 and thus survive dismissal under Rule 12(b)(6). In *Colon v. Coughlin,* 58 F.3d 865 (2d Cir.1995), the plaintiff alleged that defendants conspired to subject him to retaliatory false charges and to deprive him of a fair hearing in retaliation for bringing prior lawsuits. The Court, in reversing the district court’s grant of summary judgment, credited plaintiff’s unsupported allegations of retaliation noting that plaintiff had filed two prior lawsuits regarding conditions of his confinement and that the “temporal proximity between an inmate’s lawsuit and disciplinary action may serve as circumstantial evidence of retaliation.” *Colon,* 58 F.3d at 872. In addition, the Circuit credited plaintiff’s statement that he had no record of prior incidents of misbehavior and held that “evidence of prior good behavior also may be circumstantial evidence of retaliation.” 58 F.3d at 872. This circumstantial evidence, combined with incriminating statements made by corrections officers, prompted the Second Circuit to conclude that summary judgment was inappropriate.

In the instant action, plaintiff has stated that he was an honor block inmate with no prior record of misbehavior and that the alleged retaliatory acts of defendants occurred in close proximity to his filing of prior lawsuits. In addition, plaintiff has alleged that a correction officer told him that action would be taken to protect the honor of a “loved one.” These allegations are sufficient to withstand a motion to dismiss under Fed. R. 12(b)(6). Plaintiff has raised a colorable suspicion of retaliation and must be given an opportunity to conduct discovery regarding this claim.

8. HEARING/CONFINEMENT ISSUES

***9** Plaintiff contends that hearing officer G. Blaetz intentionally retaliated against plaintiff by conducting a biased hearing with the intent to find him guilty of the charges in the allegedly false misbehavior report. He also contends that the hearing officer impermissibly confined plaintiff pending the disposition of the hearing. During the hearing, plaintiff asserts that defendant Blaetz denied him an opportunity to prove his claim of retaliatory false charges by refusing to permit plaintiff to call certain witnesses or to question the corrections officers involved in the search of plaintiff’s cell and in the subsequent misbehavior report. In addition, plaintiff alleges that the hearing officer found him guilty “although the evidence presented supported the defendants had maliciously fabricated the report.” Complaint at 36.

Plaintiff was found guilty of three of the charges and was sentenced to sixty days keeplock and loss of privileges. Selsky affirmed this disposition on appeal. Complaint at 27, 29. Plaintiff maintains that “[d]efendants Coombe, Glenn Goord, Selsky, Artuz, Portuondo and Coefield were notified through correspondence, and direct appeals of the retaliatory misbehavior report and conduct, but failed to investigate or overturn the guilty disposition....” Affirmation at 7.

Defendants argue that the holding of *Sandin v. Conner,* 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), mandates dismissal of plaintiff’s hearing and confinement claims. However, because I find that plaintiff’s complaint concerns substantive due process rights regarding retaliatory discipline, and not simply procedural due process issues, the complaint cannot be dismissed on this ground.

The “crux” of plaintiff’s claim is that state officials violated his First Amendment right by retaliating against him for exercising his constitutionally protected right to seek redress in federal court. *Sandin* addressed procedural due process claims and made the distinction that inmates

> retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate.

Sandin. 115 S.Ct. at 2302, n. 11.

Here, plaintiff is alleging retaliatory discipline for exercising a First Amendment right. “*Sandin* did not affect substantive constitutional rights, nor did *Sandin* eliminate challenges to retaliatory discipline.” *Mckenzie v. Hollins,* No. 95 CV 0880 (RSP/GJD), 1996 WL 596722 (N.D.N.Y. Oct.11, 1996) (*citing Pratt v. Rolland,* 65 F.3d 802 (9th Cir.1995).) Consequently, whether plaintiff’s 60 day confinement and loss of privileges is of “real substance” and would constitute an “atypical or significant hardship [ ]” creating a liberty interest protected by the Due Process Clause is not a question this Court need reach for the purposes of dismissal under Rule 12(b)(6).

Although *Sandin* cannot constitute the basis for dismissal of plaintiff’s retaliation claims, another recent Supreme Court case, *Edwards v. Balisok* —— U.S. – – – – , 117 S.Ct. 1584, —— L.Ed.2d – – –%B 1997 WL 255341 (May

19, 1997), further altered the due process analysis governing prison disciplinary hearings. The plaintiff in *Edwards,* Jerry Balisok, was found guilty at a disciplinary hearing of violating prison rules. He was sentenced to 10 days in isolation, 20 days in segregation, and deprivation of 30 days good-time credit. The plaintiff filed suit alleging that the procedures used in his hearing violated his Fourteenth Amendment right to due process. Specifically, the plaintiff alleged that the hearing officer "concealed exculpatory witness statements and refused to ask specified questions of requested witnesses ... which prevented respondent from introducing extant exculpatory material and 'intentionally denied' him the right to present a defense." The plaintiff further contended that these acts were the product of "deceit and bias" on the part of the hearing officer. Mr. Balisok's disciplinary disposition was affirmed on appeal.

***10** The Supreme Court applied *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 to Mr. Bolisok's claim and held "that a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated."[6] *Edwards,* 520U.S. 641 at ——, 117 S.Ct. 1584, 137 L.Ed.2d 906 at ——, 1997 WL 255341 at *1. In the instant action, plaintiff's disciplinary hearing finding of guilt has not been invalidated or overturned on appeal.

The *Edwards* Court looked at the nature of claim brought by plaintiff to determine if a finding in plaintiff's favor would "necessarily imply the invalidity of the judgment." 520 U.S. 641 at ——, 117 S.Ct. 1584, 137 L.Ed.2d 906 at ——, 1997 WL 255341 at *3. The Court held that "allegations of deceit and bias on the part of the decisionmaker ... necessarily imply the invalidity of the punishment and imposed [and would not be] cognizable under § 1983." *Id.* at * 4. In the instant action, Higgins claims that hearing officer Blaetz intentionallly retaliated against him by conducting a biased hearing with the intent to find him guilty of the charges against him. I find plaintiff's claims of retaliation against the hearing officer indistinguishable from the allegations of deceit and bias set forth in *Edwards.* Although plaintiff also alleges procedural defects at his disciplinary hearing, his "principal" claim, as in *Edwards,* is one of retaliation and therefore "necessarily impl[ies] the invalidity of the punishment imposed." *Edwards* at * 6. Applying the *Heck* analysis mandated by *Edwards* to the instant action, I dismiss all claims regarding retaliation on the part of hearing officer Blaetz and D. Selsky.[7]

QUALIFIED IMMUNITY

The doctrine of qualified immunity shields government officials in an action under 42 U.S.C. § 1983 "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citations omitted). Even where the rights were clearly established, the official will not be held personally liable if it was objectively reasonable for the official to believe that his or her acts did not violate those rights. *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

In order to determine whether a right is "clearly established," the Court must consider: (1) whether the right was defined with reasonable specificity, (2) whether Supreme Court and Circuit Court cases have clearly established the right, and (3) whether a reasonable defendant would have understood that his or actions were unlawful in light of preexisting law. *Jermosen v. Smith,* 945 F.2d 547, 550 (2d Cir.1991), *cert. denied,* 503 U.S. 962, 112 S.Ct. 1565, 118 L.Ed.2d 211 (1992). "[B]are allegations of malice, [however] should not suffice to subject government officials to either the costs of trial or to the burdens of broadreaching discovery." *Harlow,* 457 U.S. at 817–18.

***11** Plaintiff's allegations concern retaliatory conduct occurring between 1994 and 1995. The right to petition the government for the redress of grievances is a fundamental right stated with sufficient clarity in the First Amendment. In addition, the right of inmates to petition the government for redress of grievances without reprisal, including the right of access to the court, was clearly established well before 1994. *See Sostre v. McGinnis,* 442 F.2d 178, 189 (2d Cir.1971) (en banc) (confinement for past or threatened litigation against prison officials constituted due process violation), *cert. denied,* 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 (1972); *Haymes v. Montanye,* 547 F.2d 188, 191 (2d Cir.1976), *cert. denied,* 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977) (confiscation of a petition complaining of inmate's access to the law library violated the First Amendment right to petition for redress of grievances); *Flaherty,* 713 F.2d at 13 (outlined the procedure to be followed by the district court when confronted with a prisoner's claim that administrative decision was taken in retaliation for filing litigation); *Purcell v. Coughlin,* 790 F.2d 263, 265 (2d Cir.1986) (per curiam) (inmate's allegation that he was placed on Central Monitoring Case status in retaliation for commencing litigation stated a claim for relief); *Morello v. James,* 810 F.2d 344, 346 (2d Cir.1987) (intentional theft of inmate's papers constitutes denial of access to courts).

Thus, it is not objectively reasonable for defendants to believe that their purported retaliatory actions did not

violate plaintiff's rights, and therefore defendants are not entitled to qualified immunity.

PERSONAL INVOLVEMENT

As a prerequisite to a § 1983 claim, plaintiff must allege a defendant's direct or personal involvement in the alleged constitutional deprivation. *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994). Liability for damages in an action under § 1983 may not be based on the respondeat superior or vicarious liability doctrines. *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Plaintiff's pleadings fail to allege facts demonstrating that defendants D. Bliden, T. Bushek, Gail Haponik, Philip Coombe, Glenn Goord, C. Artuz, L. Portuondo or C. Coefield, each holding supervisory positions within Greenhaven Correctional Facility or within the Central Office of the Department of Corrections, had any direct involvement, knowledge of, or responsibility for the alleged retaliatory acts against plaintiff. Plaintiff merely alleges that the above defendants are personally involved because they were either informed verbally or in writing, or they "knew or should have known" of the incidents forming the basis of this complaint and that they failed to take sufficient action.

The defendants cannot be held liable on this theory. "[S]upervisory liability may be imposed where an official demonstrates 'gross negligence' or 'deliberate indifference' to the constitutional rights of inmates by failing to act on information indicating that unconstitutional practices are taking place." *Wright,* 21 F.3d at 501. "However, it is well-established that an allegation that an official ignored a prisoner's letter of protest and request for an investigation of allegations made therein is insufficient to hold that official liable for the alleged violations." *Greenwaldt v. Coughlin,* No. 93 Civ. 6551(LAP), 1995 WL 232736 at *3 (S.D.N.Y. April 19, 1995) (*citing Murray v. Coughlin,* No. 91–CV–0476, 1995 WL 128968 at *6 (W.D.N.Y. Mar. 15, 1995)); *Cepeda v. Coughlin,* No. 91 Civ. 2469(RWS), 1995 WL 23566 at *3 (S.D.N.Y. Jan.19, 1995); *Clark v. Coughlin,* No. 92 Civ. 0920(RWS), 1993 WL 205111 at *6 n. 2 (S.D.N.Y. June 10, 1993), *aff'd,* 17 F.3d 391 (2d Cir.1993); *Garrido,* 716 F.Supp. at 100 (dismissing that portion of complaint against NYSDOCS Commissioner where his only alleged connection to the case was that "he ignored plaintiff's letter of protest and request for an investigation of the allegations made in [the] action)." *Compare Larkins v. Oswald,* 510 F.2d 538, 539 (2d Cir.1975) (an allegation that the Superintendent failed to act after receiving an *official* report containing allegations of unconstitutional violations may be actionable). As such, all such failure to supervise claims against these defendants are dismissed.

MOTION TO AMEND COMPLAINT

***12** In his reply Affirmation, plaintiff, for the first time, raises allegations of retaliatory transfer and inadequate medical treatment. These allegations are beyond the scope of the instant action. If plaintiff wishes to pursue these claims, he may submit a proper motion to amend attaching a proposed amended Complaint for consideration by the Court. The proposed motion should be confined to these issues and received by the Court no later than thirty days from the date of this Order.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss the Complaint is DENIED in part and GRANTED in part as follows:

Defendants' motion to dismiss is denied on the claims relating to incidents (5), the lost legal documents and, (7), the retaliatory false misbehavior report. As such, the motion to dismiss the Complaint as against defendants Cottington, Whitney, R. Murphy, and Surber is DENIED.

All claims relating to (1) plaintiff's prison job assignment; (2) the missing Appendix; (3) the emergency telephone call; (4) the missing police report; (6) the cell search, and (8) the hearing/confinement issues are dismissed in their entirety. Because the actions taken by defendants G. Blaetz, D. Selsky, P. Nelson, S. Kapland, Snyder and Naggy in these incidents did not violate plaintiff's constitutional rights, defendants' motion to dismiss the Complaint against these defendants is GRANTED.

Defendants' motion to dismiss D. Bliden, T. Bushek, Gail Haponik, Philip Coombe, Glenn Goord, C. Artuz, L. Portuondo and C. Coefield for lack of personal involvement is GRANTED.

SO ORDERED

Footnotes

1 Plaintiff is an active litigant, having brought several suits against Greenhaven officials in this Court. Plaintiff's instant retaliation claim arises out of a suit currently pending before me, *Higgins v. Artuz,* No. 94 Civ. 4810(SS). In addition to Christopher Artuz, Superintendent for the Greenhaven Facility, plaintiff named two corrections officers in that action, G. Wildrick and Daniel Evertts.

2 Although not so designated in the caption, "P. Nelson" is referred to as a defendant in the body of plaintiff's complaint.

3 Officer Wildrick is not named as a defendant in this action.

4 I note that plaintiff's complaint alleges that he has filed federal habeas corpus actions in both the Southern and Eastern Districts of New York.

5 I note that these allegations were not contained in plaintiff's complaint and first appeared in plaintiff's response, (Affirmation), to defendants' motion to dismiss the complaint. Ordinarily I would not consider plaintiff's Affirmation as supplemental to his complaint. However, I afford plaintiff latitude on this occasion since I am considering dismissal under Fed.R.Civ.P. 12(b)(6).

6 In doing so, the Supreme Court implicitly upheld this Circuit's holding in *Black v. Coughlin,* 76 F.3d 72 (2d Cir.1996). In *Black,* the Second Circuit, applying a *Heck* analysis, held that a prisoner's constitutional claim regarding disciplinary due process did not accrue until a state court reversed his disciplinary sentence. 76 F.3d at 75.

7 *Edwards* was decided after the instant motion was filed. Neither party has asked to raise or brief the effect of *Edwards* on the facts presented here. However, should the parties have arguments which bear on this issue, I invite a motion for reconsideration.