Matter of Perkins v Rock
2016 NY Slip Op 31315(U)
June 30, 2016
Supreme Court, Franklin County
Docket Number: 2011-273
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
MICHAEL PERKINS, #95-A-0851,
Plaintiff,

DECISION, ORDER AND JUDGMENT
RJI #16-1-2011-0124.27
INDEX # 2011-273
-against- **ORI #NY016015J**

DAVID A. ROCK, DONALD ULHER, GERALD J. OTIS, MICHAEL J. LIRA, DONALD QUINN, MATTHEW G. RANIERI, MICHAEL H. YADDOW, DAVID GREEN, BEAU J. BRAND, JOHN DOE, HANK HERRMANN, JOHN DOE, S. CARBOTTI, JOHN DOE and **C. FRASER,**
Defendants.

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This action pursuant to 42 U.S.C. § 1983 was commenced by the Complaint of Michael Perkins, dated March 13, 2011 and filed in the Franklin County Clerk's Office on March 18, 2011. Plaintiff, who was a DOCCS inmate at the Upstate Correctional Facility[1], seeks injunctive relief and compensatory damages. As stated in paragraph 19 of the Complaint, "[t]his action arises under and is brought pursuant to 42 U.S.C. § 1983 to remedy the deprivation under color of state law of rights guaranteed by the New York

[1] Although plaintiff was confined at the Upstate Correctional Facility at the time this action was commenced, he was unconditionally released from DOCKS custody in December of 2013 upon reaching the maximum expiration date of his underlying sentence(s). Plaintiff has not contacted the Court since his release and, therefore, the Court has no idea where he resides at this time.

State Constitution Article One . . . §§ 1; 5; 6; 8; 9(1); and 11."[2] Defendants have moved to dismiss for failure to state a cause of action and their application is opposed by the plaintiff.

The structure of the Compliant is curious in a number of respects. Section II of the Complaint, labeled "Parties, Jurisdiction," contains 20 separately numbered paragraphs. Paragraphs 21 and 22 are set forth in sections III ("Previous Lawsuits by Plaintiff") and IV ("Exhaustion Of Administrative Remedies") of the Complaint, respectively. Section V of the Complaint, labeled "Statement of Claim," contains numbered paragraph 23 along with 11 additional, un-numbered paragraphs. Section VI of the Compliant, labeled "Plaintiff Will Show Not Isolated Incident," contains numbered paragraph 24 along with 15 additional, un-numbered paragraphs. The final section of Complaint - VII, labeled "Prayer For Relief" - contains a second numbered paragraph 24 and numbered paragraphs 25 and 26.

7 NYCRR §302.2 sets forth a detailed list of items of clothing, bedding, toilet articles and writing materials that must be issued to an inmate initially upon his/her admission to a Special Housing Unit (SHU), as well as personally owned items that an inmate is permitted to possess immediately upon his/her admission to an SHU. 7 NYCRR §303.1, describing procedures associated with post-admission SHU adjustment, provides, in relevant part, as follows:

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[2] It might be argued that plaintiff's assertion on this point would, in and of itself, support dismissal since a 1983 action must be based upon a deprivation of rights, privileges or immunities secured by the United States Constitution or a federal statute. In view of plaintiff's status as a *pro se* inmate litigant, and given the fact that defendants interposed no objection, the Court will treat plaintiff's allegations with respect to the deprivation of rights guaranteed by the New York State Constitution as allegations with respect to the deprivation of rights guaranteed by analogous provisions of the United States Constitution.

> "(a) After completing a period of 30 consecutive days of satisfactory adjustment, *i.e.*, a period free of disciplinary sanctions (including time spent serving a keeplock or special housing disposition prior to transfer to a SHU), each inmate will be permitted additional items/privileges as set forth below [7 NYCRR §§303.2 and 303.3] . . .
>
> (b) Actions resulting in disciplinary sanctions during the 'post adjustment' period may result in a loss of privileges and the imposition of a new 30-day adjustment period."

In addition to the foregoing, "[i]nmates at Upstate [Correctional Facility] are assigned cells based upon a written protocol designated as the Progressive Inmate Movement System, or 'PIMS', intended to provide incentive and encourage behavioral adjustment for SHU inmates. Under the PIMS, there are three designated categories of SHU cells; level three affords the most desirable conditions, while PIMS level one inmates enjoy the least privileges." *Cicio v. Lamora*, 2010 WL 106 3875 (ND NY 2010) (citations omitted). "If an inmate is to progress from PIMS Level I to PIMS Level II, he must at a minimum have 30 days at Level I status with disciplinary reports. Movement from PIMS Level II to Level III requires at a minimum that the inmate must remain at Level II for 30 days with no disciplinary reports." *Smith v. Artus*, 2010 WL 3910086 (ND NY 2010) (citations omitted).

Plaintiff begins section V of the Complaint (" Statement Of Claim") by referencing an inmate grievance compliant that he filed at the Upstate Correctional Facility on or about October 20, 2009. The grievance complaint dealt with "no televison programs 'sit-come and/or movies' being broadcast" through wall units to SHU inmates at Upstate. According to the Plaintiff, his grievance was denied and such denial was ultimately affirmed by the Inmate Grievance Program Central Office Review Committee (CORC) on

or about December 30, 2009. Plaintiff then alleges that he "...filed an article 78 'Order to show cause' on or about the 7th day of April, 2010."[3]

In section V of his Complaint plaintiff goes on to reference the filing of inmate misbehavior reports against him on April 18, 2010 (at Upstate), April 18, 2010 (at Upstate), April 19, 2010 (at Downstate Correctional Facility) and April 30, 2010 (at Downstate). Prior to the issuance of the inmate misbehavior reports on April 18, 2010 plaintiff enjoyed PIMS Level III status. As a result of the filing the inmate misbehavior reports on that date, however, he was reduced to PIMS Level I. He remained on Level I status until June 7, 2010, when he was moved up to PIMS Level II. Several days later, however, on or about June 9, 2010, plaintiff was again reduced to PIMS Level I status, where he apparently remained for an additional 30-day period.

The first inmate misbehavior report issued on April 18, 2010, authored by C.O. Niles, charged plaintiff with violations of inmate rules 106.10 (direct order), 107.10 (interference) and 112.20 (delay of count). A Tier II Disciplinary Hearing was conducted at Upstate with respect to those charges on May 18, 2010. At the conclusion of the hearing the plaintiff was found not guilty of all three charges with the hearing officer writing the following on the disposition sheet: "Dismissed due to medical considerations that have been felt [sic] with."

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[3] As shown in plaintiff's Exhibit E, attached to the Complaint, plaintiff's challenge to the refusal of DOCCS officials to broadcast television programs over the wall unit system at the Upstate Correctional Facility was actually commenced on March 23, 2010 when his petition for judgement pursuant to Article 78 of CPLR, verified on March 16, 2010, was filed in the Franklin County Clerk's Office. *See* CPLR § 304(a). An Order to Show Cause in that proceeding was issued on April 6, 2010 and filed in Franklin County Clerk's Office on April 7, 2010.

The second inmate misbehavior report issued on April 18, 2010, authored by C.O. James, charged plaintiff with violations of inmate rules 124.15 (inmate shall not waste food) and 118.22 (an inmate shall not commit an unhygienic act such as propelling food). A Tier II Disciplinary Hearing was conducted at Upstate with respect to those charges on May 18, 2010. At the conclusion of the hearing plaintiff was found guilty, upon his plea, and a disposition of counsel and reprimand was imposed.

The inmate misbehavior report issued on April 19, 2010, authored by C.O. Torres, charged plaintiff with violations of inmate rules 100.10 (assault on inmate) and 106.10 (refusal to obey direct order). A Tier III Superintendent's Hearing was conducted at Upstate with respect to those charges on June 9, 2010. At the conclusion of the hearing plaintiff was found not guilty of violating inmate rule 106.10 but guilty, upon his plea, of the assault charge. A disposition was imposed placing him on a restrictive diet for five days, with such disposition suspended and deferred.

The Court finds nothing in the Complaint or the Exhibits annexed thereto setting forth the nature of the charges set forth in the inmate misbehavior report issued on April 30, 2010 or the ultimate disposition of such charges.

In section VI of the Complaint ("Plaintiff Will Show Not Isolated Incident") plaintiff references the filing of additional inmate misbehavior reports against him on August 28, 2010 (at Upstate), August 29, 2010 (at Upstate), September 18, 2010 (at Great Meadow Correctional Facility) October 1, 2010 (at Downstate Correctional Facility) and October 17, 2010 (at Upstate).

The inmate misbehavior report issued on August 28, 2010, authored by C.O. Granger, charged plaintiff with violations of inmate rules 104.13 (creating a disturbance)

and 118.33 (flooding). A Tier III Superintendent's Hearing was commenced at Upstate with respect to those charges on October 12, 2010. At the conclusion of the hearing, on October 22, 2010, plaintiff was found guilty of both charges and a seven-day restricted diet penalty (deferred for 120 days) was imposed. The results and disposition of the Tier III Superintendent's Hearing concluded on October 22, 2010 were, however, reversed on administrative appeal on December 17, 2010.

The inmate misbehavior report issued on August 29, 2010, also authored by C.O. Granger, charged plaintiff with a violation of inmate rule 118.33 (flooding). A Tier III Superintendent's Hearing was conducted at Upstate with respect to that charge on October 5, 2010. At the conclusion of the hearing plaintiff was found guilty and a five-day restricted diet penalty (suspended and deferred) was imposed. The results and disposition of the Tier III Superintendent's Hearing of October 5, 2010 were affirmed on administrative appeal on December 17, 2010.

The inmate misbehavior report issued on September 18, 2010, authored by C.O. Corbatti, charged plaintiff with violations of inmate rules 104.11 (violent conduct), 107.10 (interference) and 118.22 (unhygienic act). A Tier III Superintendent's Hearing was commenced at Upstate with respect to those charges on October 13, 2010. At the conclusion of the hearing, on October 20, 2010, plaintiff was found not guilty of all three charges.

The inmate misbehavior report issued on October 1, 2010, authored by C. O. Sauria, charged plaintiff with violations of inmate rules 107.10 (threats) and 107.11 (harassment). A Tier III Superintendent's Hearing was commenced at Upstate with

respect to those charges on October 15, 2010. At the conclusion of the hearing, on October 18, 2010, plaintiff was found not guilty of both charges.

The inmate misbehavior report issued on October 17, 2010, authored by C.O. Herrmann, charged petitioner with violations of inmate rules 102.10 (threats), 104.13 (creating a disturbance), 106.10 (direct order), 107.10 (interference) and 107.11 (harassment). A Tier II Disciplinary Hearing was conducted at Upstate with respect to those charges on October 22, 2010. At the conclusion of the hearing petitioner was found not guilty of violating inmate rule 107.10 but guilty of the remaining four charges. The results and disposition of the Tier II Disciplinary Hearing of October 22, 2010 were, however, reversed on administrative appeal on November 2, 2010.

In their motion to dismiss defendants first argue that " . . . Plaintiff has failed to state a viable claim that his rights under the Double Jeopardy clause have been violated." Plaintiff's double jeopardy claim appears to arise from the fact that as of June 9, 2010, when he was found guilty of violating inmate rule 100.10 (assault on inmate) (April 19, 2010 incident) he had already gone more than 30 consecutive days (since April 30, 2010) without having been issued an inmate misbehavior report. Since plaintiff was apparently returned to PIMS Level I status for 30 additional days following the June 9, 2010 hearing, he asserts that he was, in effect, punished twice for the same offense. Notwithstanding such argument, and even if the PIMS protocol was improperly applied, this Court agrees with defendants that the scope of the Double Jeopardy clause of the United States Constitution is limited to criminal prosecutions (*Breed v. Jones*, 421 US 519) and that sanctions imposed in the context of prison disciplinary proceedings " . . . do not constitute criminal punishment triggering double jeopardy protections." *People v. Vasquez*, 89

NY2d 521, 532-533, *cert denied sub nom Cordero v. Lalor*, 522 US 846. This Court finds no basis to apply a different standard with respect to sanctions imposed in the context of the PIMS protocol and, accordingly, the Court finds that the Complaint fails to state a cause of action based upon a purported violation of the Double Jeopardy clause of the United States Constitution.

Defendants next argue that plaintiff's due process claim fails to state a cause of action since he was not deprived of a legally cognizable liberty interest. Reading the Complaint expansively, the Court finds that plaintiff's due process claim arises from the circumstances whereby he was allegedly improperly confined under PIMS Level I status for an eight-day period (approximately) from May 30, 2010 to June 7, 2010, for a 30-day period commencing on or about June 9, 2010 and for a 50-day period (approximately) from September 28, 2010 to November 17, 2010. At this point the Court must stress that there is nothing in the Complaint to suggest that plaintiff is asserting any claim with respect to the circumstances whereby he was removed from general population and placed in the Special Housing Unit at the Upstate Correctional Facility. Rather, his due process claim is limited to the circumstances whereby he was moved from PIMS Level III to PIMS Level I within the Special Housing Unit environment.

"To proceed on a due process claim with respect to a prisoner's disciplinary proceeding, a plaintiff must establish (1) possession of a liberty interest and (2) deprivation by defendants of that interest as a result of insufficient process." *Dawkins v. Gonyea*, 646 F Supp 2d 594, 605 (SD NY 2009) (citations omitted). *See Taylor v. New York Department of Corrections*, 2012 WL 2469856 (SD NY 2012). Defendants' motion to dismiss focuses exclusively on the issue of whether or not plaintiff's presumed

improper confinement on PIMS Level I status during the time periods alleged constitutes the deprivation of a liberty interest so as to support his claim for relief in this 1983 action. In *Sandin v. Conner*, 515 US 472, the Supreme Court determined that an inmate's confinement upon disposition of a prison disciplinary proceeding implicates a constitutionally protected liberty interest only were such confinement constitutes an " . . . atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 US 472, 484 (1995). The *Sandin* standard is not met unless the disciplinary sanction is "onerous." *Jenkins v. Haubert*, 179 F3d 19 at 28 (2d Cir 1999).

This Court is unaware of any judicial authority wherein the *Sandin* standard was considered in the context of an alleged improper transfer of an SHU inmate from PIMS Level III to PIMS Level I. Notwithstanding the foregoing, the Second Circuit Court of Appeals has determined that under "ordinary" SHU conditions (described by the court as " . . . doubtless unpleasant and somewhat more severe than those of general population . . .") a 101-day SHU confinement did not constitute an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life so as to implicate a liberty interest under the *Sandin* standard. *Sealey v. Giltner*, 197 F3d 578 at 489-490 (2d Cir 1999). *See also Colon v. Howard*, 215 F3d 227 at 232 (2d Cir 2000) (while not adopting a bright line approach, SHU confinement of 101 to 305 days warrants a more detailed record for an appellate review). Plaintiff, quoting *Palmer v. Richards*, 364 F3d 60, 65 (2d Cir 2004) points out in his opposing papers that an SHU confinement of less than 101 days " . . . could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* . . ." This Court again notes, however, that while all of the relevant judicial authorities considering *the*

Sandin standard examine the length of SHU confinement and severity of such confinement *vis a vis* conditions in general population, this Court, in addition to considering the relatively brief duration plaintiff's placement on PIMS Level I status, is only concerned with the severity of the conditions of SHU confinement on Level I status *vis a vis* the conditions of SHU confinement on Level III status. Neither the Complaint nor plaintiff's opposing papers shed any clear light on the differences in the conditions encountered by an SHU inmate on PIMS Level I status verses an SHU inmate on PIMS Level III status. Indeed, the only differences in conditions mentioned by plaintiff is the fact that he was not permitted to keep his headphones when on Level I status.

In the view of all of the foregoing, and given the brief time periods during which plaintiff claims to have been unlawfully placed on PIMS Level I status while in SHU confinement at the Upstate Correctional Facility, the Court finds, as a matter of law, that those periods of Level I confinement do not rise to the level of atypical and significant hardship in relation to the ordinary incidents of prison life so as to implicate a constitutionally protected liberty interest under the *Sandin* standard.

In their motion to dismiss defendants next argue that plaintiff's retaliation claim should be dismissed since he pled guilty to committing an unhygienic act (second April 18, 2010 incident) and assaulting another inmate (April 19, 2010 incident). Citing *Lowrance v. Achtyl*, 20 F3d 529 (2d Cir 1994), defendants argue that "[w]hen it is undisputed that an inmate has in fact committed prohibited conduct, no retaliatory discipline claim can be sustained." In his opposing papers, plaintiff stresses the fact that the charges set forth in the inmate misbehavior reports issued on August 28, 2010, September 18, 2010, and

October 1, 2010 were all either dismissed at their respective hearings or reversed on administrative appeal.

Central to a retaliation claim in the prison setting, which finds its roots in the First Amendment to the United States Constitution, is the principle that correction staff may not take actions that would have a chilling effect on an inmate's exercise of his/her First Amendment rights. *See Gill v. Pidlypchak*, 389 F3d 379 (2d Cir 2004). Since claims of retaliation are easily asserted, however, courts have scrutinized such claims with particular care. In this regard the Second Circuit has noted as follows: " . . . claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliations pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official - even those otherwise not rising to the level of a constitutional violation - can be characterized as a constitutionally proscribed retaliatory act." *Dawes v. Walker*, 239 F3d 489, 491 (2d Cir 2001) (citations omitted). *See Flaherty v. Coughlin*, 713 F2d 10 (2d Cir 1983). To prevail on a retaliation claim plaintiff must demonstrate, among other requirements, a causal connection between his/her protected speech and the adverse action taken - in other words, that the protected conduct was a substantial or motivating factor in the defendant's decision to take action against the plaintiff. *Mt. Healthy City School District Board of Education v. Doyle*, 429 US 274 at 287.

Plaintiff's opposing papers contain scant and largely-conclusory reference to any constitutionally-protected activity that allegedly motivated the issuance of the various charges of inmate misbehavior that were ultimately dismissed. The Complaint appears

to suggest that his commencement of a CPLR Article 78 proceeding in early April of 2010 (actually March 23, 2010) challenging a December 30, 2009 CORC grievance denial determination was the motivating factor in the issuance of the inmate misbehavior reports in April of 2010 and August, September and October of 2010. As alluded to previously, plaintiff pled guilty to violating significant standards of inmate behavior in connection with reports issued on April 18, 2010 and April 19, 2010. The record also suggests that plaintiff was found guilty of one or more charges set forth in the report issued on April 30, 2010. Only one of the reports issued on April 18, 2010 resulted in a dismissal of charges with the cryptic notation that such dismissal was " . . . due to medical considerations that have been delt [sic] with." As far as the inmate misbehavior reports issued in August, September and October of 2010 are concerned, the Court first notes that plaintiff's underlying inmate grievance complaint did not allege any misconduct on the part of DOCCS staff at Upstate Correctional Facility. Rather, the main issue set forth in the grievance complaint " . . . is that none of the wall-unit jacks . . . play regular television and movie programs . . ." To suggest, as plaintiff apparently does, that his commencement of a CPLR Article 78 proceeding challenging the CORC's denial of this innocuous grievance with respect to in-cell entertainment features at the Upstate Correctional Facility was the motivating factor in the issuance of false inmate misbehavior reports five to seven months later is simply not creditable. In this regard it is noted that the inmate misbehavior reports issued on September 18, 2010 and October 1, 2010 were not even issued by DOCCS staff at the Upstate Correctional Facility. The September 18, 2010 report was issued at the Great Meadow Correctional Facility and the October 1, 2010 report was issued at the Downstate Correctional Facility. For what it is worth, the Court also notes

that the dismissal of the charges set forth in those two reports occurred following a Tier III Superintendent's Hearing conducted at Upstate. In view of all of the foregoing, this Court finds, as a matter of law, that plaintiff's Complaint fails to state any cause of action based upon alleged retaliation.

Finally, to the extent defendants seek an order precluding plaintiff from commencing further *pro se* proceedings without prior judicial leave, the Court finds that this issue has effectively been rendered moot by plaintiff's unconditional release from DOCCS custody.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that defendants' motion to dismiss is granted; and it is further

ADJUDGED, that the Complaint is dismissed.

Dated: June 30, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice