HALL v. ZAKEN et al

2021 | Cited 0 times | W.D. Pennsylvania | July 6, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA LAMONT HALL,)

Plaintiff,)

vs.) Civil Action No. 20-1431

Judge Weigand MICHAEL ZAKEN, et al.,) Magistrate Judge Dodge Defendants.)

REPORT AND RECOMMENDATION I. Recommendation It is respectfully recommended that the Motion to Dismiss filed by Defendants (ECF No. 28) be granted in part and denied in part. II. Report

A. Relevant Background Plaintiff Lamont Hall, a prisoner at the State Correctional Institution at Greene, Pennsylvania (SCI Greene), brings this pro se civil rights action under 42 U.S.C. § 1983. He asserts claims related to his conditions of confinement under the Eighth Amendment and violations of his procedural and substantive due process rights under the Fourteenth Amendment. Named as defendants are Michael Zaken, the Superintendent of SCI Greene, Robert Gilmore, the former Superintendent, John E. Wetzel, Secretary of the Pennsylvania Department of , Captain Durco, Correctional Officer Lukachyk and Keri Moore, a DOC grievance officer.

Pending before the Court is Defendants motion to dismiss, which only seeks dismissal of certain claims and defendants. For the reasons that follow, their motion should be granted in part and denied in part.

B. Procedural History

Plaintiff commenced this action by submitting a Complaint without the filing fee or a motion for leave to proceed in forma pauperis. (ECF No. 1). After his subsequent motion to proceed in forma pauperis was granted, the Complaint was filed. (ECF No. 5).

In Count I, Plaintiff alleges that his solitary confinement in the Restricted Housing Unit RHU and placement on the constituted cruel and unusual punishment in violation of the Eighth Amendment. Plaintiff claims in Counts II and III, respectively, that his confinement violated his procedural and substantive due process rights under the Fourteenth Amendment. Along with monetary damages and other relief, he seeks a declaratory judgment and an injunction directing his return to the general

prison population.

Defendants motion to dismiss (ECF No. 28) was later filed and has been briefed (ECF Nos. 29, 32).

C. Facts Alleged in Complaint

Plaintiff was first incarcerated in 2009 following his conviction for attempted murder. He was first incarcerated at SCI Greene, where the relevant events are alleged to have occurred, in 2015. (Compl. ¶ 15.) On August 3, 2018, Plaintiff and his cellmate came under suspicion of possessing K- - Id. ¶ 16.) Officer Lukachyk and Lt. Lewis, along with Lt. Silbaugh (who is not named as a defendant) corrections o searched his cell, eventually finding this contraband in his cellm (Id. ¶ 17.) Plaintiff and his cellmate were then searched, questioned, and placed into an RHU cell. Captain Durco told his subordinates to place him in the RHU. (Id. ¶ 75.)

Plaintiff alleges that when he declined to talk to Lt. Silbaugh, the lieutenant told him that a Case 2:20-cv-01431-CCW-PLD Document 40 Filed 07/06/21 Page 2 of 21 encouraging group activity, egulation not specified (charge No. 52) and a misconduct report (No. none of the other inmates listed on the misconduct report were issued a misconduct for the same

or other offenses. (Id. ¶¶ 18-22.) On August 18, 2018, Plaintiff was found guilty of charge No. 52 and was required to serve 90 days in disciplinary custody in the RHU. His cellmate pleaded guilty to possession of the K-2 found in the cell and served an unknown period in disciplinary custody. (Id. ¶¶ 23-24.)

Several days later, when Plaintiff was taken to another RHU block to separate his personal property from that of his cellmate, he asked staff to provide him with two sticks of cocoa butter and give his cellmate the rest. (Id. ¶ 26.) Plaintiff did not know that these sticks reportedly contained K-2. Plaintiff was questioned by two staff members about the cocoa butter sticks and told them that it s cellmate took responsibility for possessing this contraband. (Id. ¶¶ 28-30.)

Later that day, Officer Lukachyk removed Plaintiff from him cell and questioned him about the K-2. intention to convince Plaintiff that said drug (Id. ¶ 31.) Plaintiff later was issued a misconduct for the K-2 found in the cocoa butter sticks but this charge was dismissed by the hearing examiner because his cellmate said that they were his property. (Id. ¶¶ 33-34.)

Officer Lukachyk later questioned Plaintiff about Muslim oil in an eye-drop bottle that purportedly contained liquid K-2. (Id. ¶¶ 35-36.)Later, Plaintiff learned that a number of SCI Greene staff had fallen ill as a result of exposure to this Muslim oil. As a result, personal property was quarantined. (Id. ¶¶ 39-40.) Plaintiff was placed in the RHU without his property and reportedly slept in the same clothing for 40 days and Case 2:20-cv-01431-CCW-PLD Document 40 Filed 07/06/21 Page 3 of 21 (Id. ¶ 42.) He filed a grievance about this issue.

After these events, a local news outlet reported that corrections staff became ill from an (Id. ¶ 45.) Plaintiff characterizes these allegations as a to allow the PA DOC to hire a company to process all inmate mail & books so the PA DOC could receive financial kick-backs from said company. (Id. ¶ 45 n.1.) Following this news, various unidentified RHU staff retaliated against him at various unspecified times by denying him exercise and food trays. (Id. ¶ 46.) He filed a grievance about these actions as well.

On September 3, 2018, Plaintiff was questioned by Darren Fisher, a police investigator, who told him that the lab results were negative for the presence of drugs. Plaintiff told Fisher that the various staff members who allegedly lying and (Id. ¶¶ 48-50.) Because of this interview,

Plaintiff was again placed in the RHU, denied exercise, food trays, commissary items, and eventually placed on the RRL on May 7, 2019 (Id. ¶¶ 52-53.) place Plaintiff on RRL status. (Id. ¶ 52.) Prisoners placed on the RRL are held in indefinite solitary confinement. (Id. ¶ 62.)

rstanding of when and how RRL was created, as well as the policies confinement. As stated in the Complaint, the Department of Corrections created the policy and process and later amended it. Plaintiff alleges that the standards and process for decision making are Further, although Superintendent Zaken continues to recommend

Secretary Wetzel has the sole

authority to review recommendations for removal and decide whether a prisoner should remain on this status or be returned to the general population. (Id. ¶¶ 62, 72.)

Every ninety days, the Prison Review Committee (PRC) asks Plaintiff if he has any concerns but does not assess whether he presents a security risk or the propriety of his status on the RRL. His requests to return to the general population have been denied. (Id. ¶¶ 59-60, 63.) On August 25, 2020, Plaintiff filed a grievance about his continued RRL status and solitary confinement. (Id. ¶ 61.)

Plaintiff claims that he has been held in solitary confinement for 28 months with no reason. Defendants have failed to provide him with a meaningful opportunity to challenge his solitary confinement and RRL status; provide information about the basis for decisions about his continued placement there; give him a meaningful opportunity to be heard by the decision- maker; or advise him of what is necessary to be released. He alleges that he has sustained various injuries while in confinement. (Id. ¶¶ 56-57.) Defendants are aware of the long-term effects of solitary confinement and the damages he has suffered. (Id. ¶¶ 66-70.)

D. Standard of Review

Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well- pleaded

allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff plausibility. Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555- Id. (quoting Fowler v. UPMC Shadyside, 578 F.3d f Twombly, 550 U.S. at 555. See also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

As noted by the Third Circuit in Malleus v. George, 641 F.3d 560, 563 (3d Cir. 2011), a 12(b)(6) inquiry includes identifying the elements of a claim, disregarding any allegations that are no more than conclusions and then reviewing the well-pleaded allegations of the complaint to evaluate whether the elements of the claim are sufficiently alleged. to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment Phillips v. County of Allegheny, 515 F.3d 224, 236 (3d Cir. 2008) (citation omitted).

When dismissing a civil rights case for failure to state a claim, a court typically must allow a plaintiff to amend a deficient complaint, irrespective of whether it is requested, unless Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc. Alston v. Suzuki, 227 F.3d 107, 121 (3d Cir. 2000).

document filed pro se is to be liberally construed and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers[.] Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal citation and quotation marks omitted); see also , 655 F.3d 333, 339 (3d Cir. 2011) liberally construe a pro se - .

Additionally, under the screening provisions of the Prison Litigation Reform Act, Pub. L. No. 104- , courts are required to screen complaints at

any time where, as is the case here, a prisoner has been granted leave to proceed in forma pauperis, 28 U.S.C. § 1915(e)(2)(B)(ii), and/or seeks redress from an officer or employee of a governmental entity. 28 U.S.C. § 1915A. As a result, if there is a ground for dismissal which was not relied on by a defendant in a motion to dismiss, the Court may still sua sponte rest its dismissal upon such ground under the screening provisions of the PLRA. See, e.g., Banks v. Cty. of Allegheny, 568 F. Supp. 2d 579, 588-89 (W.D. Pa. 2008). In performing a courts mandated function of sua sponte reviewing complaints under the PLRA to determine if the plaintiff has failed to state a claim upon which relief can be granted, a federal district court applies the same standard applied to motions to dismiss under Rule 12(b)(6). Id.

In ruling on a Rule 12(b)(6) motion, courts generally consider only the complaint, attached exhibits and matters of public record. Schmidt v. Skolas, 770 F.3d 241, 249 (3d Cir. 2014). Plaintiff has attached to the Complaint one of the grievances he filed (Compl. Ex. 1), which can be considered in connection with the motion to dismiss.

E. Analysis

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Plaintiff are asserted under 42 U.S.C. § 1983, which provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... 42 U.S.C. § 1983. Section vindicating federal rights elsewhere conferred by those parts of the United States Constitution

Baker v. McCollan, 443 U Albright v. Oliver, 510 U.S. 266, 271 (1994). See also Baker, 443 U.S. at 140; Graham v.

Connor, 490 U.S. 386, 394 (1989).

The Complaint alleges violations of the Eighth Amendment, that unusual punishment. Plaintiff has also brough both procedural and substantive due process

claims under the Fourteenth Amendment, which prohibits a state actor from depriving The substantive due process

clause Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 399 (3d Cir. 2000). 1

Defendants assert that the following claims and defendants should be dismissed: (1) all claims against Defendants Lukachyk, Durco, Lewis, Moore and Gilmore; (2) any claims related to the dismissed misconduct; (3) any claims related to the disposal/destruction of property; (4) any claims related to verbal threats or harassment; (5) any claims related to retaliation; and (6) all claims in Defendants respective official capacities.

1. Eighth Amendment Claim Against Moore, Gilmore, Lewis, Durco and Lukachyk Plaintiff alleges that in violation of his Eighth Amendment rights, he has been kept in solitary confinement for an extended and unlimited period. According to his Complaint, he was lodged in the RHU permanently in September 2018 and placed on the RRL in May 2019, which effectively prevents him from petitioning to be released from the RHU. He alleges, among other things, that he spends 23 hours a day in a small cell, is denied adequate exercise, cannot speak to other inmates and is kept in a cell that illuminated 24 hours a day. As a result of this

1 Whether Plaintiff claims arising out of his conditions of confinement are appropriately analyzed under the Eighth Amendment or the substantive due process clause of the Fourteenth Amendment depends on whether he was a convicted prisoner or a pretrial detainee at the time. See Stevenson v. Carroll, 495 F.3d 62, 67 (3d Cir. 2007); Hubbard v. Taylor, 399 F.3d 150, 164 (3d Cir. 2005). As Plaintiff was a convicted prisoner, his claims will be analyzed under the Eighth Amendment.

confinement, he claims to have sustained various injuries and damages. While the PRC reviews his status every 90 days, Plaintiff contends that this review is meaningless because only Secretary Wetzel has the authority to release him from RRL status and return him to the general population. 2

Secretary Wetzel has made at least two decisions to keep him in solitary confinement.

Plaintiff has brought an Eighth Amendment claim against all defendants and asserts that all of them are aware of the harm and risks of solitary confinement and the deprivation of his basic human needs. Defendants argue in their motion, among other things, that his Eighth Amendment claims against defendants Moore, Gilmore, Durco, Lewis and Lukachyk must be dismissed, requiring a review of the alleged conduct with respect to each of these defendants.

Defendant Moore Plaintiff does not articulate any role by defendant Moore about his continued confinement other than the allegation that she has - Moore is not alleged or continued solitary confinement. Although Plaintiff states that he filed a grievance regarding his confinement in the RHU, he cannot state a claim against Moore based on actions underlying the grievances themselves. al knowledge necessary for a defendant to be found personally involved in the alleged unlawful Mearin v. Swartz, 951 F. Supp. 2d 776, 782 (W.D. Pa. 2013). See also Jefferson v. Wolfe, 2006 WL 1947721, at *17 (W.D. Pa. July 11, 2006); Watkins v. Horn, 1997 WL 566080,

2 This appears to be an accurate summary of the process. See Washington-El v. Beard, 562 F. App from administrative custody only upon prior approval of the Secreta

at *4 (E.D. Pa. Sept. 5, 1997); Seldon v. Wetzel, 2020 WL 929950, at *4 (W.D. Pa. Feb. 6, 2020), report and recommendation adopted, 2020 WL 924046 (W.D. Pa. Feb. 26, 2020). Thus, even that Moo of the grievance related to his solitary confinement, he has failed to state an Eighth Amendment claim against her.

Defendant Gilmore Defendants argue that, with respect to against him are that he was the former Superintendent at SCI-

The Court of Appeals has held that Evancho v. Fisher, 423 F.3d 347,

353 (3d Cir. 2005) (quoting Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988)).

Rode, 845 F.2d at 1207. These allegations must be made with appropriate particularity. Id.

about Defendant Gilmore are not specific enough to meet the relevant pleading standard. He does not allege any personal involvement on the part of Superintendent Gilmore in the same conduct as Superintendent Zaken does not state a claim. A review of the Complaint

suggests that the specific conduct in which Superintendent Zaken is alleged to have engaged may have occurred after Superintendent Gilmore was no longer at SCI Greene. Therefore, there are made recommendations about his continued status there or had any dialog with Plaintiff about

his prolonged solitary confinement.

Based on the allegations of the Complaint, the Court cannot conclude that amendment would be futile. should be dismissed without prejudice to amending this claim.

Defendants Lewis, Durco and Lukachyk about his property. Plaintiff further claims that Officer Lukachyk threatened to take action

against him based on the lab results. Defendants argue these claims fail because verbal harassment alone does not state a claim under the Eighth Amendment.

verbal harassment does not constitute cruel and unusual punishment, deprive a prisoner of a

Gannaway v. Berks Cty. Prison See also Dunbar v. Barone, ns of threats by Lt. Lewis and Officer Lukachyk fail to state a claim.

Defendants also contend that the only allegation about Captain Durco is that he on August 3, 2018. Placement in the RHU does not itself represent an Eighth Amendment violation. See Gibson v. Lynch, 652 F.2d 348, 352 (3d Cir. 1981). As a result, without more, this allegation would be insufficient to state a claim against Captain Durco.

Defendants also argue that Lt. Lewis, Captain Durco and Officer Lukachyk should be dismissed from this case because Plaintiff has failed to sufficiently allege their individual involvement in any violation of his civil rights. According to Defendants, none of these

defendants are alleged to have any involvement in the decision-making process related to his RRL placement; they were only involved in the investigatory phase that led to his confinement in the RHU.

Plaintiff alleges, however, that Lt. Lewis, Captain Durco and Officer Lukachyk worked which knowingly would cause higher echelon prison authorities to recommend the RRL status

r words, all three defendants are alleged to have provided information to individuals with decision-making authority to ensure that he would be placed indefinitely in the RHU and facilitate his placement on the RRL. Plaintiff further alleges that these defendants are aware of the unconstitutional conditions of his confinement which they facilitated. Thus, construed liberally as the Court must do, Plaintiff has adequately alleged an Eighth Amendment claim against Lt. Lewis, Captain Durco and Officer Lukachyk.

Defendants also interpret conspiracy must provide some factual basis to support the existence of the elements of a

Capogrosso v. The Supreme Ct. of New Jersey, 588 F.3d 180, 185 (3d Cir. 2009). Although it is unclear if Plaintiff intended to allege a claim of conspiracy, he should be permitted to amend the Complaint in the event that he meant to do so.

2. Procedural Due Process Claim In Count II of the Complaint, Plaintiff asserts that with respect to his solitary confinement, all the defendants violated his civil rights under the due process clause of the Fourteenth Amendment. He alleges that in connection with his solitary confinement, defendants failed to provide him with a meaningful opportunity to challenge it; provide information about

the basis for decisions about his continued placement there; give him a meaningful opportunity to be heard by the decision-maker; and advise him of what is necessary to be released.

Plaintiff explains the process ement. As stated in the Complaint, the Department of Corrections created the policy and process. He alleges that the standards and process for decision making are He also asserts that Secretary Wetzel has the sole authority to review recommendations for removal and decide whether a prisoner should remain on this status or be returned to the general population. Plaintiff also alleges that Superintendent Zaken, who makes a recommendation about whether he should be returned t requests to be released from solitary confinement and refuses to consider or discuss the matter

with him.

Plaintiff does not allege that defendants Lewis, Durco and Lukachyk had any role in creating this policy, deciding to place him the RRL, providing on-going recommendations as to his solitary confinement status or possess decision-making authority about if or when he can be returned to the general population. 3

In fact, he alleges that only Secretary Wetzel can decide whether to remove him from the RRL. Thus, Plaintiff has failed to state a claim against defendants Lewis, Durco and Lukachyk. Given the nature of the policy and process, amendment of a procedural due process claim against them would be futile as they simply have no role in the process.

Even if Plaintiff alleges that Defendant Moore improperly handled his grievance related

3 Plaintiff has alleged that these defendants facilitated his ultimate RRL placement. That said, as discussed previously, while this may represent an Eighth Amendment violation, they are not alleged to have any role in the process for placing him on RRL status and the later decisions to maintain him on this status.

to solitary confinement, any such claim fails because he has failed to assert a constitutionally protected liberty interest ccess to prison grievance procedures is not a constitutionally- Williams v. Armstrong, 566 F. Appx. 106, 109 (3d Cir. 2014) (citing Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (colle appeals that have confronted the issue are in agreement that the existence of a prison grievance

Hoover v. Watson, 886 F. Supp. 410, 419 (D. Del. 1995), aff d, 74 F.3d 1226 (3d Cir. 1995) (if a state elects to provide a grievance process, violations of its procedures do not give rise to a § 1983 claim). Thus, Plaintiff Moore improperly handled his grievances fail to state a plausible Fourteenth Amendment due process claim

As noted previously as it relates to Superintendent Gilmore, Plaintiff does not identify any specific conduct or personal involvement by Superintendent Gilmore regarding his RRL status on solitary confinement. As a result, Plaintiff has failed to state a claim against Superintendent Gilmore. However, he should be permitted to amend his Complaint if that he can specify any personal involvement by Superintendent Gilmore that allegedly violated his procedural due process rights.

Lukachyk and Moore should be dismissed with prejudice, and dismissed without prejudice as to Superintendent Gilmore.

3. Substantive Due Process Claim Plaintiff alleges in Count III that all defendants violated his substantive due process rights by holding him in solitary confinement for an extended period of time without justification. Plaintiff is a convicted prisoner, and his claim relates the conditions of his confinement under

RRL status. For that reason, this claim is appropriately made under the Eighth Amendment and Count III should be dismissed with prejudice.

4. Official Capacity Claims Plaintiff asserts that he is suing all defendants in their official and individual capacities. Defendants argue that the official capacity claims should be dismissed.

The Supreme Court has stated that, under the over suits against unconsenting states was not contemplated by the Constitution when Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996) (internal citation omitted). The immunity applies not only to the state itself, but also to state agents and state instrumentalities. Thus, courts must examine the essential nature and effect of the proceeding, the nature of the entity created by state law or the issue of whether a money judgment against the instrumentality would be enforceable against the state to Regents of the Univ. of Calif. v. Doe, 519 U.S. 425, 429-30 (1997).

The Pennsylvania DOC is an arm of the state for Eleventh Amendment immunity purposes. See Lavia v. Pennsylvania, Dep t of Corr., 224 F.3d 190, 195 (3d Cir. 2000). In their official capacities, the

individual defendants are state agents who are entitled to Eleventh Amendment immunity for damages claims. Kentucky v. Graham, 473 U.S. 159, 166 (1985). See f State Police, 491 U.S. 58, 71 & n.10 (1989) (unless sued for 1983).

The Court of Appeals for the Third Circuit has held that Eleventh Amendment immunity is subject to three primary exceptions: (1) congressional abrogation, (2) waiver by the state, and

(3) suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law, that is, the doctrine of Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed.714 (1908). , 297 F.3d 310, 323 (3d Cir. 2002) (citation omitted). Pennsylvania has not consented to waive its Eleventh Amendment immunity to being sued in federal court. 42 Pa. C.S. § 8521(b); Chittister v. Department of Cmty. & Econ. Dev., 226 F.3d 223, 227 (3d Cir. 2000). The Supreme Courts also has Quern v. Jordan, 440 U.S. 332, 339-46 (1979).

As for the Ex parte Young exception, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief Verizon Md., Inc. ., 535 U.S. 635, 645 (2002) (citation omitted). Plaintiff seeks prospective relief in the form of an injunction releasing him from solitary confinement. As he states, however, none of the defendants possess the authority to do so other than Secretary Wetzel. Thus, with respect to claims against defendants in their official capacities, the motion to dismiss should be granted with respect to defendants Zaken, Gilmore, Durco, Lewis, Lukachyk and Moore, and granted as to Secretary Wetzel other than for the injunctive relief sought by Plaintiff.

5. Other Claims As discussed previously, the gist relates to his continuing solitary confinement. He does, however, allege a number of other facts that do not appear to relate to these claims. As a result, it is difficult to determine whether these facts are pleaded as background or the purpose of raising other claims. pro se status, other potential claims that appear to have some factual support will be briefly reviewed to determine whether amendment

is appropriate.

a. Retaliation A claim for retaliation for the exercise of First Amendment rights requires a constitutionally protected activity, a governmental entity retaliating against the plaintiff and a causal relationship between the protected activity and the retaliation. Eichenlaub v. Township of Indiana, 385 F.3d 274, 282 (3d Cir. 2004). Defendants argue that Plaintiff does not identify any constitutionally protected activity.

Plaintiff claims that prison personnel accused him of possessing K-2 and of making corrections officers ill when they came in contact with the drug. He also alleges that during an interview, he told a police investigator that the guards were only pretending to be ill, after which He also

references the grievances that he filed, which constitute protected conduct for these purposes. See Fantone v. Latini, 780 F.3d 184, 192 n.8 (3d Mitchell v. Horn, 318 F.3d 523, 530 (3d Cir. 2003) (allegation of false charge of misconduct in retaliation for filing complaints is conduct protected by the First Amendment.)

It is not clear that Plaintiff is seeking to state an independent claim for retaliation or II or III. For that reason, Plaintiff should be permitted to amend his Complaint if he intends to

assert a retaliation claim. Any such claim must be made in a separate count and Plaintiff must identify the specific defendants who are alleged to have retaliated against him and the specific conduct in which each defendant engaged.

b. False Misconduct Plaintiff alleges that he received a misconduct from Lt. Silbaugh, who is not a defendant, for the K-2 hidden in the cocoa butter stick, but it was dismissed by the hearing examiner after Pl -2 belonged to him. Defendants argue that, if Plaintiff is basing a claim on a false misconduct, it does not state a claim under either the Eighth or the Fourteenth Amendment.

alse misconduct report ... is not a cognizable Jackson v. Schouppe, 2018 WL 3361270, at *5 (W.D. Pa. July 10, 2018); Stewart v. Cameron misconduct report does See Calipo v. Wolf, 2018

WL 7412835, at *4 (W.D. Pa. Nov. 21, 2018), report and recommendation adopted, 2019 WL 858035 (W.D. Pa. Feb. 22, 2019). See Booth v. Pence, 141 F. Appx 66, 68 (3d Cir. 2005) (affirming the district court conclusion that issuance of false misconducts was not a sufficiently serious deprivation to support a claim of cruel and unusual punishment).

falsified evidence or misconduct reports, without more, are not enough to state a due process Smith v. Mensinger, 293 F.3d 641, 654 (3d Cir. 2002); see also Thomas v. McCoy, 467 inmate is afforded an . In other words, Plaintiff cannot state a due process claim based solely on the filing of an allegedly false misconduct report. See Smith, 293 F.3d at 653; see also Banks v. Rozum (3d Cir. 2016) Seville v. Martinez . He also was given the

opportunity to be heard and the misconduct charge was dismissed.

While it is not clear that Plaintiff intends to state an independent claim based on the false misconduct report, he has not stated a claim against any of the named defendants based on Lt. false misconduct report. It therefore would be futile for him to assert a claim based on a false misconduct report.

c. Property Claim As discussed, the allegations of on-going solitary confinement. That said, the Complaint includes allegations about confiscation of his personal property. Plaintiff claims that after Officer Lukachyk took his Muslim oil, Officer anything and he was returned to his cell without his

property. He does not identify who

confiscated any of his property other than the Muslim oil. Defendants argue that these allegations cannot state a claim against Officer Lukachyk.

he existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the Parratt v. Taylor, 451 U.S. 527, 542 (1981) (citation omitted), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). It also is not intentional conduct. Hudson v. Palmer For intentional, as for

negligent deprivations of property by state employees, the states action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy.

Various courts have concluded that Pennsylvania provides an adequate remedy for inmates whose property is lost, stolen, or destroyed by prison officials. Inmate grievance

procedures, as well as the Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8541-8546, are available and provide adequate post-deprivation remedies. Rossiter v. Andrews, 1997 WL 137195, at *4 (E.D. Pa. Mar. 25, 1997). See also Monroe v. Beard, 536 F.3d 198, 210 (3d Cir. 2008) (finding DC-ADM 804 to be an adequate remedy). Of course, that Plaintiff did not prevail in this procedure in no way affects the procedures adequacy as a post-deprivation remedy. Austin v. Lehman, 893 F. Supp. 448, 454 n.4 (E.D. Pa. 1995) (citations omitted).

As alleged in the Complaint, SCI Greene has a grievance process. Indeed, Plaintiff acknowledges having used this process more than once. Thus, if Plaintiff intended to assert a claim against Lukachyk arising out of the deprivation of his property, he cannot maintain such a claim and it would be futile for him to allow him to amend.

F. Conclusion For these reasons, it is respectfully recommended that the Motion to Dismiss filed by Defendants (ECF No. 28) be granted in part and denied in part as follows:

1. Count III should be dismissed with prejudice. As Plaintiff is a convicted inmate, this

claim is appropriately brought under the Eighth Amendment. Therefore, amendment would be futile. 2. All claims against Defendant Moore should be dismissed with prejudice as

amendment would be futile for the reasons set forth above. 3. Lewis, Durco and Lukachyk should

be dismissed with prejudice as amendment would be futile for the reasons set forth above. 4. ainst all defendants should be dismissed with

prejudice other than the claim for injunctive relief as it relates to Secretary Wetzel. 5. Any claims that Plaintiff may have sought to assert that are related to a false

misconduct report and confiscation of property should be dismissed with prejudice as amendment would be futile for the reasons set forth here. 6. s in Counts I and II against Defendant Gilmore should be dismissed

without prejudice and with leave to amend.

7. Lukachyk should be denied.

8. Plaintiff should be granted leave to amend his Complaint if he seeks to assert a First

Amendment retaliation claim and/or a conspiracy claim under the Eight Amendment with respect to Defendants Lewis, Durco and Lukachyk. Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections by July 20, 2021 or July 23, 2021 if proceeding pro se. Any party opposing the objections shall respond by August 3, 2021, or August 6, 2021, if proceeding pro se. Failure to file timely objections will waive the right of appeal.

/s/Patricia L. Dodge Dated: July 6, 2021 PATRICIA L. DODGE United States Magistrate Judge cc: Lamont Hall JG-3187 SCI Greene 175 Progress Drive Waynesburg, PA 15370