Muhammad v. Seiden et al

2024 | Cited 0 times | N.D. New York | June 11, 2024

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK _____ JAMIL ABDUL MUHAMMAD, P l a i n t i f f , v. 3:24-CV-0035 (L E K / M L) DANIEL L. SEIDEN, Judge; BINGHAMTON CITY COURT; ADAM WAGE, Assistant District Attorney; BROOME CNTY. DIST. ATTORNEY'S OFFICE; RANDALL STURTZ, Police Officer; and BINGHAMTON POLICE DEP'T, Defendants. _____ A P P E A R A N C E S : O F C O U N S E L : JAMIL ABDUL MUHAMMAD Plaintiff, Pro Se 119 Clinton Street, Apartment 5 Binghamton, New York 13905 MIROSLAV LOVRIC, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION The Clerk has sent this pro se Complaint (Dkt. No. 1) together with an amended application to proceed in forma pauperis ("IFP") (Dkt. No. 7) fi led by Jamil Abdul Muhammad ("Plaintiff") to the Court for re view. For the reasons discussed below, I (1) grant Plaintiff's amended IFP application (Dkt. No. 7), and (2) recommend that Plaintiff's Complaint (Dkt. No. 1) be (1) accepted in part for filing, and (2) dismissed (a) in part with leave to amend, and (b) in part without leave to amend.

2 I. BACKGROUND

Liberally construed, 1

Plaintiff's Complaint asserts that his rights were violated by Defendants Daniel L. Seiden, Binghamton City Court, Adam Wage, Broome County District Attorney's Office ("Defendant DA"), Randa ll Sturtz, and Binghamton Police Department ("Defendant BPD") (collectively "Defendants"), who were involve d in New York State criminal charges that were brought against Plaintiff. (See generally Dkt. No. 1.)

The Complaint alleges that on August 23, 2023, Plaintiff was falsely charged with harassment and criminal obstruction of breathing and an order of protection was issued against him. (Dkt. No. 1 at 6.) The Complaint alleges that after Plaintiff was arrested, he was not read his Miranda rights; he was handcuffed to a steel pole attached to a wall, which caused "tremendous pain" because of Plaint iff's "legal disabili[ies]." (Id.) The Complaint alleges that while handcuffed to the wall pole, Plaintiff urinated himself. (Id.)

The Complaint alleges that before arresting Plaintiff, the investigating officers failed to check the alleged victim—Plaintif f's wife—for bruises, consider her mental health status or mental state, or

take into consideration whether she was under the influence of drugs or alcohol. (Dkt. No. 1 at 6.) The Complaint alleges that the order of protection that was issued at Plaintiff's arraignment rendered him effectively "homeless for 2 months and 21 days while on S.S.I. medical disability until [the criminal] case was dismissed." (Id.)

The Complaint alleges that "the prosecuti on attempted on several occasions by phone and closed door meetings to coerce [Plaintiff's] wife . . . to maintain and press charges against [Plaintiff], as she continued to maintain [Plaintiff's] innocence on these matters." (Id.) Included

1 The court must interpret pro se complaints to raise the strongest arguments they suggest. Soto v. Walker, 44 F.3d 169, 173 (2d Cir. 1995) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)).

3 with the Complaint is an "Affidavit of Truth" by Plaintiff that alleges that Defendant Wage threatened to charge Plaintiff's wife with making a false statement to the police if she did not pursue the criminal charges against Plaintiff. (Dkt. No. 1 at 11.) Plaintiff alleges that he studied at Farmingdale State University in Long Island, New York for business administration and that during his studies, he took a course in psychology. (Id. at 12.) Plaintiff alleges that "even though [he didn't] obtain a degree in Psychology [he is] very aware of Mental Health and can be if the courts allow [him] to be an expert witness or learned witness in the field of Psychology" about his wife's mental health symptoms and experiences. (Id.)

The Complaint alleges that ultimately, the criminal charges against Plaintiff were dismissed. (Dkt. No. 1 at 7.)

Based on these factual allegations, the Complaint appears to assert the following six causes of action: (1) a claim that Defendants maliciously prosecuted Plaintiff in violation of the Fourth Amendment and 42 U.S.C. § 1983; (2) a claim that Plaintiff endured cruel and unusual punishment while confined after arrest in violation of the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983; (3) a claim that Plaintiff was discriminated against in violation of the Americans with Disabilities Act ("ADA"); (4) a claim that Plainti ff was discriminated against in violation of Title VI of the Civil Rights Act of 1964; (5) a claim that Defendants violated 18 U.S.C. § 241; and (6) a claim that Defendants violated N.Y. Penal Law § 195.00. (See generally Dkt. No. 1.) In addition, the Complaint mentions the Fifth Amendment, Seventh Amendment, and Ninth Amendment as grounds for relief. (Id.)

As relief, Plaintiff seeks $100,000,000.00 in damages from each Defendant. (Dkt. No. 1 at 7-8.) Plaintiff appears to request that criminal and civil violations be imposed pursuant to 18 U.S.C. § 241 and N.Y. Penal Law § 195.00. (Dkt. No. 1 at 8.)

4 On March 15, 2024, Plaintiff filed a "Supplement to Complaint."

2 (Dkt. No. 8.) The Supplement contains 75-pages of documents that appear to have little, if anything,

to do with this matter. (See generally Dkt. No. 8.) For example, the Supplement contains, among other things, a copy of Plaintiff's Certificate of Birth (Dkt. No . 8 at 25), a Judgement of Entry of Change of Name from an Ohio State Court in 1993 (id. at 26), print outs from Plaintiff's Fidelity IRA account (id. at 28), a 22-page Monthly Report to Federal Reserve Banks (id. at 37-58), and various United States Code sections (id. at 59-71, 73-75).

Plaintiff also filed an amended application to proceed IFP. (Dkt. No. 7.) II. PLAINTIFF'S AMENDED A PPLICATION TO PROCEED IN FORMA

PAUPERIS When a civil action is commenced in a federal district court, the statutory filing fee, currently set at $405, must ordinarily be paid. 28 U.S.C. § 1914(a). A court is authorized, however, to permit a litigant to proceed IFP status if a party "is unable to pay" the standard fee for commencing an action. 28 U.S.C. § 1915(a)(1). 3

After reviewing Plaintiff's amended IFP

2 Pursuant to Fed. R. Civ. P 15(d) "[o]n moti on and reasonable notice, the court may . . . permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Plaintiff failed to file a motion to supplement. In addition, the "Supplement" fi led by Plaintiff does not relate to events that occurred after the Complaint was filed on January 9, 2024. 3 The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. Hayes v. United States, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); Fridman v. City of N.Y., 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002).

5 application (Dkt. No. 7), the Court finds that Plaintiff meets this standard. Therefore, Plaintiff's amended application to proceed IFP is granted. 4

(Id.) III. LEGAL STANDARD FOR INITIAL REVIEW OF COMPLAINT

"Notwithstanding any filing fee, or any porti on thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

In determining whether an action is frivolous, the court must consider whether the complaint lacks an arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). Dismissal of frivolous actions is appropriate to prevent abuses of court process as well as to discourage the waste of judicial

resources. Neitzke, 490 U.S. at 327; Harkins v. Eldridge, 505 F.2d 802, 804 (8th Cir. 1974); see Fitzgerald v. First East Seventh Street Tenants Corp., 221 F.3d 362, 364 (2d Cir. 2000) (a district court "may dismiss a frivolous complaint sua sponte even when the plaintiff has paid the required filing fee[.]"); see also Pflaum v. Town of Stuyvesant, Columbia Cnty., N.Y., 11-CV-0335, 2016 WL 865296, at *1, n.2 (N.D.N.Y. Mar. 2, 2016) (Suddaby, C.J.) (finding that the Court had the power to address and dismiss additional theories of the plaintiff's retaliation claim sua sponte because those theories were so lacking in arguable merit as to be frivolous). In order to state a claim upon which relief can be granted, a complaint must contain, inter alia, "a short and plain statement of the claim showi ng that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief

4 Plaintiff is reminded that, although his IFP application has been granted, he is still required to pay fees that he may incur in this action, including copying and/or witness fees.

6 means that a complaint "must cont ain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 [2007]). "Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not shown–that the pleader is entitled to relief." Iqbal, 556 U.S. at 679 (internal citation and punctuation omitted). "In reviewing a complaint . . . the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Courts are "obligated to construe a pro se complaint liberally." Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009); see also Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (reading the plaintiff's pro se complaint "broadly, as we must" and holding that the complaint sufficiently raised a cognizable claim). "[E]xt reme caution should be exercised in ordering sua sponte dismissal of a pro se complaint before the adverse party has been served and [the] parties . . . have had an opportunity to respond." Anderson v. Coughlin, 700 F.2d 37, 41 (2d Cir. 1983). IV. ANALYSIS

In addressing the sufficiency of a plaintiff's complaint, the court must construe his pleadings liberally. Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008).

7 Having reviewed Plaintiff's Complaint with this principle in mind, I recommend that the Complaint be (1) accepted in part for filing, and (2) dismissed (a) in part with leave to amend, and (b) in part without leave to amend.

A. Claims Seeking Criminal Charges Plaintiff's claims pursuant to 18 U.S.C. § 241 and N.Y. Penal

Law § 195.00 cannot proceed.

There is no private right of action to enforce state or federal criminal statutes. See generally Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); see also Walker v. CIBC Ltd., 20-CV-1337, 2021 WL 3518439, at *5 (N.D.N.Y. Apr. 13, 2021) (Hummel, M.J.) ("It appears plaintiff is either seeking the criminal prosecution of an individual or individuals or a law enforcement investigation, which is beyond this Court's jurisdiction."), report- recommendation adopted by 2021 WL 3204860 (N.D.N.Y. July 29, 2021) (McAvoy, J.); McFadden v. Ortiz, 12-CV-1244, 2013 WL 1789593, at *3 (N.D.N.Y. Apr. 26, 2013) (D'Agostino, J.) (holding that "there is no private right of action to enforce either state or federal criminal statutes.").

As a result, I recommend dismissal of Plaintiff's claims that are premised on alleged violations of federal or state criminal laws. See Polinski v. Oneida Cnty. Sheriff, 23-CV-0316, 2023 WL 2988753, *4 (N.D.N.Y. Apr. 18, 2023) (Lovric, M.J.) (citing inter alia, Hall v. Sampson, 21-CV-4839, 2022 WL 2068248, at *2 n.2 (E.D. Pa. June 8, 2022) (holding that the plaintiff cannot bring criminal charges against the defendants through a private lawsuit and that claims pursuant to 18 U.S.C. § 241 do not give rise to a civil cause of action); Walthour v. Herron, 10-01495, 2010 WL 1877704, at *2 (E.D. Pa. May 6, 2010) (recognizing no private

8 right of action under 18 U.S.C. § 241)) (recommending dismissal of the plaintiff's claims pursuant to the New York State Penal Law and 18 U.S.C. § 241), report and recommendation adopted by, 2023 WL 3344060 (N.D.N.Y. May 10, 2023) (Hurd, J.), appeal dismissed by 2023 WL 8357375 (2d Cir. Oct. 12, 2023).

B. Claims Pursuant to the ADA The ADA "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." Tennessee v. Lane, 541 U.S. 509, 516-17 (2004). In addition, "Title V of the ADA, sometimes referred to as the 'retaliation provi sion,'" prohibits retalia tion against individuals "engaged in activity protected by the ADA." Griffiths v. Saint Josephs Hosp., 22-CV-0199, 2022 WL 1271533, at *3 n.5 (N.D.N.Y. Apr. 5, 2022) (Dancks, M.J.) (citing Chiesa v. New York State Dep't of Labor , 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.)), report and recommendation adopted by, 2022 WL 1265761 (N.D.N.Y. Apr. 28, 2022) (Hurd, J.).

"[T]here is no individual liability under the ADA." Gomez v. N.Y.C. Police Dep't, 191 F. Supp. 3d 293, 302-03 (S.D.N.Y. 2016). As a result, I recommend that Plaintiff's ADA claim against Defendants Seiden, Wage, and Sturtz, be dismissed with prejudice.

With respect to Plaintiff's ADA claim agai nst Defendants Binghamton City Court, DA, and BPD, I recommend that it be dismissed for failure to state a claim upon which relief may be granted. 5

5 Based on the facts alleged, Plaintiff could not proceed with a claim under Title I of the ADA, which addresses employment discrimination, because he has not alleged that he was employed by Defendants. 42 U.S.C. § 12117; see Mary Jo C. v. New York State and Local Retirement Sys., 707 F.3d 144, 169 (2d Cir. 2013) ("Title I of the ADA expressly deals with th[e] subject of employment discrimination . . . .") (c itation and internal quotation marks omitted).

9 To establish a prima facie violation under Title II of the ADA or the RA, a plaintiff must show: "that 1) he is a qualified individual with a disability; 2) [defendants are] entit[ies] subject to the acts; and 3) he was denied the opportunity to participate in or benefit from [defendants'] services, programs, or activities or [defendants] otherwise discriminated against him by reason of his disability." Rivera v. Quiros, 23-CV-0227, 2024 WL 363193, at *6 (D. Conn. Jan. 31, 2024) (quoting Wright v. New York State Dep't of Corr. , 831 F.3d 64, 72 (2d Cir. 2016)). There are "three available theories" of discrimin ation that can be used to establish the third prong of an ADA claim: "(1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009).

The undersigned finds that although Plaintiff has adequately alleged, at least for purposes of this review, that he is a qualified individual with a disability and Defendants are entities subject to the acts, Plaintiff has failed to sufficiently plead that Defendants "denied [him] the opportunity to participate in or benefit from public services, programs, or activities, or has otherwise discriminated against him, by reason of his disability rather than a legitimate nondiscriminatory reason." Tsuma v. Costello, 22-CV-0067, 2022 WL 1036819, at *8 (D. Conn. Apr. 6, 2022). More specifically, Plaintiff has not alleged facts plausibly suggesting that Defendants discriminated against him on the basis of his disability. See Franks v. Eckert, 18-

Title III of the ADA is "not appl icable to public entities" and t hus, is inapplicable here where Defendants Binghamton City Court, DA, and BPD are public entities. Morales v. New York, 22 F. Supp. 3d 256, 266-67 (S.D.N.Y. 2014) (citing cases). Moreover, Title IV of the ADA does not appear to be applicable to Plaintiff's claims because Title IV prohibits disability discrimination in telecommunications. See Genco v. Sargent & Collins LLP, No. 18-CV-0107, 2018 WL 3827742, at *3, n.5 (W.D.N.Y. June 4, 2018). Lastly, Title V of the ADA, sometimes referred to as the "retaliation pr ovision," also does not appear a pplicable because Plaintiff does not allege that he engaged in activity protected by the ADA, that Defendants were aware of that activity, or any causal connection between the allegedly adverse actions that Defendants took against him and the protected activity. See Chiesa v. New York State Dep't of Labor, 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.).

10 CV-0589, 2020 WL 4194137, at *4 (W.D.N.Y. July 21, 2020) ("Although [t he p]laintiff has alleged he was denied some of his requested reasonable accommodations, there are no facts in the Amended Complaint to suggest that [the d]efendants refused to allow [the p]laintiff to participate in any program or activity because of his disability"); see also Rosado v. Herard, 12- CV-8943, 2014 WL 1303513, at *6 (S.D.N.Y. Mar. 25, 2014) (dismissing ADA claims where the plaintiff failed to "plead[ ]

facts demonstrati ng that he was denied access to therapeutic group sessions because of a disability"). Instead, Pl aintiff asserts that he suffers from physical disabilities, and that he was mistreated by employees of Defendants DA, BPD, and Binghamton City Court, but fails to allege that he was mistreated because of his physical disabilities. See Moran v. Deamelia, 17-CV-0422, 2017 WL 2805160, at *3 (N.D.N.Y. Apr. 20, 2017) (Hummel, M.J.) ("Although [the] defendants may have been aw are of [the] plaintiff's alleged disabilities because his underlying discrimination complaint against his former employer filed with the NYSDHR appears to have been based, in part, on his disabilities, he offers not even a scintilla of proof that the alleged misconduct was 'motivat ed' by his major depressive disorder and ADHD."), report and recommendation adopted, 17-CV-0422, 2017 WL 2804941 (N.D.N.Y. June 28, 2017) (McAvoy, J.). Indeed, there are no facts to suggest that Defendants were even aware of his disability. See, e.g., Costabile v. New York Dist. Council of Carpenters, 17-CV- 8488, 2018 WL 4300527, at *5 (S.D.N.Y. Sept. 10, 2018) (dismissing the plaintiff's discrimination claim under the ADA because he failed to allege that the defendants were aware of his disability, and, thus, "fail[ed] to pl ead even a barebones claim of disability discrimination"). Moreover, Plaintiff does not identify what public services, programs, or activities he was denied the opportunity to participate in or benefit from. See Cordero v. Semple, 696 F. App'x 44, 45 (2d Cir. 2017) (summary order) (affirming the dismissal of an ADA claim

11 because the plaintiff "did not al lege that his conditions prevented him from participating in any programs or activities"). It is, therefore, recommended that Plaintiff's ADA claim against Defendants DA, BPD, and Binghamton City Court be dismissed for failure to state a claim upon which relief may be granted.

C. Claims Pursuant to Title VI Section 601 of Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. To state a claim under Title VI, a plaintiff must allege that (1) the defendant discriminated against him on the basis of race, color, or national origin; (2) the discrimination was intentional; and (3) the discrimination was a substantial and motivating factor for the defendant's actions. See Tolbert v. Queens Coll., 242 F.3d 58, 69 (2d Cir. 2001); Alexander v. Sandoval, 532 U.S. 275, 281 (2001) ("Title VI itself directly reach[es] only instances of intentional discrimination," not disparate impact).

"Title VI does not provide for individual liability." Sherman v. Yonkers Pub. Schs., 21- CV-7317, 2023 WL 137775, at *7 (S.D.N.Y. Jan. 9, 2023) (citing Bayon v. State Univ. of N.Y. at Buffalo, 98-CV-0578, 2001 WL 135817, at *2 (W.D.N.Y. Feb. 15, 2001)). As a result, I recommend that Plaintiff's Title VI claim against Defendants Seiden, Wage, and Sturtz, be dismissed with prejudice.

With respect to Plaintiff's Title VI claim against Defendants Binghamton City Court, DA, and BPD, I recommend that it be dismissed because the Complaint fails to allege facts plausibly suggesting that Plaintiff was discriminated against on the basis of race.

12 The Complaint alleges that "[a]s an African American [Plaintiff] was faced with [r]acial [d]iscrimination as all black men are violent and [an o]rder of protection was taken out against [him]." (Dkt. No. 1 at 7.)

This sole conclusory allegation—that because Plaintiff is Black, that he must have been discriminated against—fails to pl ausibly suggest that Plaintiff was discriminated on the basis of race. See Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 235 (2d Cir. 2002) ("Even if [plaintiff's] highly dubious claim that he was unfairly singled out for punishment by the instructors is credited, [plaintiff] has done little more than cite to his alleged mistreatment and ask the court to conclude that it must have been related to his race."); Varughese v. Mount Sinai Med. Ctr., 12- CV-8812, 2015 WL 1499618, at *42 (S.D.N.Y. Mar. 27, 2015) ("fallacy" for the plaintiff to conclude: "I belong to a protecte d class; something bad happened to me at work; therefore, it must have occurred because I belong to a protected class"); Rissman v. Chertoff, 08-CV-7352, 2008 WL 5191394, at *4 (S.D.N.Y. Dec. 12, 2008) ("In essence, plaint iff alleges that because he was yelled at [by his supervisors], this must have been because [of his protected status]. Such conclusory and speculative statements are insufficient.").

As a result, I recommend that Plaintiffs' Title VI claim against Defendants Binghamton City Court, DA, and BPD be dismissed for failure to state a claim upon which relief may be granted.

D. Claims Pursuant to 42 U.S.C. § 1983 For the reasons set forth below, I recommend that Plaintiff's claims pursuant to 42 U.S.C. § 1983 be accepted in part for filing and denied in part.

13 1. Claims Against Defendant Seiden Judges are absolutely immune from suit for claims seeking damages for any actions taken within the scope of their judicial responsibilities. See Mireles v. Waco, 502 U.S. 9, 11-12 (1991). Generally, "acts arising out of, or related to, individual cases before [a] judge are considered judicial in nature." Bliven v. Hunt, 579 F.3d 204, 210 (2d Cir. 2009). "[E]ven allegations of bad faith or malice cannot overcome judicial immunity." Bliven, 579 F.3d at 209. Judicial immunity does not apply when a judge takes action outside his or her judicial capacity, or when a judge takes action that, although judicial in nature, is taken "in the complete absence of all jurisdiction." Mireles 502 U.S. at 11-12; see also Bliven, 579 F.3d at 209-10 (describing actions that are judicial in nature). However, "the scope of [a] judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." Stump v. Sparkman, 435 U.S. 349, 356 (1978).

Plaintiff asserts claims that appear to arise from the efforts of Defendant Seiden, in his capacity as a judge in Binghamton City Court. (Dkt. No. 1 at 6.) Defendant Seiden is therefore immune from suit under the doctrine of judicial immunity. As a result, I recommend that Plaintiff's claims against Defendant Seiden in his individual capacity be dismissed based on the doctrine of judicial immunity.

Moreover, I recommend that Plaintiff's claims against Defendant Seiden in his official capacity be dismissed pursuant to the Eleventh Amendment. See Sundwall v. Leuba, 28 F. App'x 11, 12 (2d Cir.

2001) (citing K & A Radiologic Tech. Servs., Inc. v. Comm'r of the Dep't of Health, 189 F.3d 273, 278 (2d Cir. 1999)) (holding that "s tate officers, if sued in their official capacities, are immunized from suit by private citizens under the Eleventh Amendment."); King v. New York State, 23-CV-3421, 2023 WL 5625440, at *4 (E.D.N.Y. Aug. 31, 2023) (citing

14 Thomas v. Martin-Gibbons, 857 F. App'x 36, 37 (2d Cir. 2021) (affirming dismissal of pro se Section 1983 claims against the State of New York and a state court judge in his official capacity based on Eleventh Amendment immunity)) ("Elev enth Amendment immunity extends to state officials acting in their official capacities, including state court judges."); Aron v. Becker, 48 F. Supp. 3d 347, 366-67 (N.D.N.Y. 2014) (McAvoy, J.) (dismissing the plaintiff's claims against a state court judge in his official capacity based on the doctrine of Eleventh Amendment immunity).

2. Claims Against Defendant Binghamton City Court New York State is immune from suits pursuant to 42 U.S.C. § 1983 seeking either legal or equitable relief, under the Eleventh Amendment. Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984); see Ognibene v. Niagara Cnty. Sheriff's Dep't, 03-CV-0678, 2003 WL 24243989, at *3 (W.D.N.Y. Dec. 1, 2003) ("To the extent th e plaintiff names various state courts as defendants and seeks either legal or equitable relief against them under § 1983, they are immune from such suit under the Eleventh Amendment."). As an agency or arm of the State of New York, Defendant Binghamton City Court is immune from suit under the Eleventh Amendment. See Kentucky v. Graham, 473 U.S. 159, 166 (1985); Bonilla v. Connerton, 15-CV-1276, 2016 WL 2765287, at *4 (N.D.N.Y. Apr. 14, 2016) (Peebles, M.J.) (recommending dismissal of the claims to the extent that they seek monetary damages against the "Binghamton City Court" as barred by the Eleventh Amendment), report and recommendation adopted by, 2016 WL 2760373 (N.D.N.Y. May 12, 2016) (Kahn, J.); see also Mercado v. Town of Goshen, 20-CV-5399, 2020 WL 5210949, at *3 (S.D.N.Y. Aug. 28, 2020) ("Plaintiff sues the 'Orange County Court,' which is part of the New York State Unified Court System. The Court therefore dismisses Plaintiff's §

15 1983 claims against this Defendant under the doctrine of Eleventh Amendment immunity and because these claims are frivolous."); Curto v. Palisades Collection, LLC, 07-CV-529S, 2008 WL 11357852, at *4 (W.D.N.Y. Mar. 10, 2008) (dismissing the plaintiff's claims against the "New York State Unified Court System, 8th Judici al District Buffalo City Court" as barred by the Eleventh Amendment); Saint-Fleur v. City of New York, 99-CV-10433, 2000 WL 280328, *2 (S.D.N.Y., Mar. 14, 2000) (collecting cases) ("State courts, as arms of the State, are entitled to Eleventh Amendment immunity from suit in federal court."); Fields v. Walthers, 94-CV-1659, 1997 WL 204308 at *2 (N.D.N.Y. April 5, 1997) (Pooler, J.) ("For Eleventh Amendment purposes, governmental entities of the state that are considered 'arms of the state' receive Eleventh Amendment immunity.").

3. Claims Against Defendant Wage To the extent that the Complaint is construed against Defendant Wage in his official capacity, I recommend that it be dismissed based on the doctrine of immunity set forth in the Eleventh Amendment. A claim against Defendant Wage in his official capacity is

essentially a claim against Defendant DA. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); Reynolds v. Giuliani, 506 F.3d 183, 191 (2d Cir. 2007)("An official capacity suit against a public servant is treated as one against the governmental entity itself."). For the reasons set forth below in Part IV.D.4., I find that Defendant Wage, in his official capacity, is immune from a suit for damages pursuant to 42 U.S.C. § 1983, and thus, recommend dismissal.

16 To the extent that the Complaint is construed against Defendant Wage in his individual capacity, I recommend that it be accepted in part for filing and dismissed in part for failure to state a claim upon which relief may be granted.

a. Malicious Prosecution To prove a malicious prosecution claim, a plaintiff must demonstrate "(1) that the defendant initiated a prosecution against the plaintiff, (2) that the defendant lacked probable cause to believe the proceeding could succeed, (3) that the defendant acted with malice, and (4) that the prosecution was terminated in the plaintiff's favor." Posr v. Court Officer Shield # 207, 180 F.3d 409, 417 (2d Cir. 1999) (citing Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997)).

Out of an abundance of caution, mindful of the Second Circuit's instruction that a pro se plaintiff's pleadings must be liberally construed, see, e.g., Sealed Plaintiff, 537 F.3d at 191, and without expressing an opinion as to whether Plaintiff can withstand a properly filed motion to dismiss or for summary judgment, I recommend that a response be required to Plaintiff's malicious prosecution claim pursuant to the Fourth Amendment against Defendant Wage in his individual capacity. b. Cruel and Unusual Punishment

"The Eighth Amendment protects against cruel and unusual punishment. These protections of the Eighth Amendment only apply to a person who has been criminally convicted and sentenced; they do not apply to the conduct of police officers in connection with the investigation and arrest of suspects prior to conviction and sentencing." Spicer v. Burden, 564 F. Supp. 3d 22, 31-32 (D. Conn. 2021). Hence, "[a] pret rial detainee's claims of unconstitutional conditions of confinement are governed by the Due Process Clause of the Fourteenth

17 Amendment, rather than the Cruel and Unusual Punishments Clause of the Eighth Amendment." Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017).

Here, the Complaint fails to allege facts plausibly suggesting that Defendant Wage was involved in the conditions of Plaintiff's confinement. (See generally Dkt. No. 1.) The Complaint alleges that after arrest Plaintiff was subject to unsatisfactory conditions of confinement and Defendant Wage become involved with Plaintiff's criminal charges at the time of arraignment. (Dkt. No. 1 at 6.) Based on the allegations contained in the Complaint, upon Defendant Wage's involvement with Plaintiff, he was no longer incarcerated. (Dkt. No. 1 at 7 [alleging that Plaintiff was essentially "homeless the entire

time totaling 2 months and 21 days."].) Hence, the Complaint fails to allege the personal involvement of Defendant Wage in the allegedly unconstitutional conditions of confinement.

As a result, I recommend that Plaintiff's cruel and unusual punishment claim against Defendant Wage in his individual capacity be dismissed.

4. Claims Against Defendant DA To the extent Plaintiff seeks money damages against Defendant DA, those claims are barred by the Eleventh Amendment. Drawhorne v. Aloise, 23-CV-1278, 2023 WL 8188396, at *3 (N.D.N.Y. Nov. 27, 2023) (Dancks, M.J.) (citing Best v. Brown, 19-CV-3724, 2019 WL 3067118, at *2 (E.D.N.Y. July 12, 2019) (dismissing the plaintiff's claim against the Office of the Queens County District Attorney as barred by the Eleventh Amendment); D'Alessandro v. City of New York, 713 F. App'x 1, 8 (2d Cir. 2017) ("[I]f a dist rict attorney or an assistant district attorney acts as a prosecutor, she is an agent of the state, and therefore immune from suit in her official capacity."); Rich v. New York, 21-CV-3835, 2022 WL 992885, at *5 n.4 (S.D.N.Y. Mar. 31, 2022) ("[A]ny claims Plaintiff may raise ag ainst the DA Defendants in their 'official

18 capacity' would be precluded by immunity under the Eleventh Amendment."); Gentry v. New York, 21-CV-0319, 2021 WL 3037709, at *6 (N.D.N.Y. June 14, 2021) (Lovric, M.J.) (recommending dismissal of the plaintiff's claims against the defendant assistant district attorneys in their official capacities—which were effectively cl aims against the State of New York—as barred by the Eleventh Amendment) adopted by, 2021 WL 3032691 (N.D.N.Y. July 19, 2021) (Suddaby, C.J.)). Therefore, the undersigned recommends Plaintiff's Section 1983 claims against Defendant DA be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e); Drawhorne, 2023 WL 8188396, at *3.

5. Claims Against Defendant Sturtz "Dismissal is appropriate wher e a defendant is listed in the caption, but the body of the complaint fails to indicate what the defendant did to the plaintiff." Cipriani v. Buffardi, 06-CV- 0889, 2007 WL 607341, at *1 (N.D.N.Y. Feb. 20, 2007) (Kahn, J.) (citing Gonzalez v. City of New York, 97-CV-2246, 1998 WL 382055, at *2 (S.D.N.Y. July 9, 1998)); see also Crown v. Wagenstein, 96-CV-3895, 1998 WL 118169, at *1 (S.D.N.Y. Mar. 16, 1998) (mere inclusion of warden's name in complaint insufficient to allege personal involvement); Taylor v. City of New York, 953 F. Supp. 95, 99 (S.D.N.Y. 1997) (same).

The Complaint names Sturtz as a defendant, but the body lacks any allegations of wrongdoing by this individual. (See generally Dkt. No. 1.) As a result, I recommend that the claims against Defendant Sturtz be dismissed for failure to state a claim upon which relief may be granted.

6. Claims Against Defendant BPD Defendant BPD is merely a department of a municipality, and thus, is not amenable to suit. See White v. Syracuse Police Dep't, 18-CV-1471, 2019 WL 981850, at *3 (N.D.N.Y. Jan.

19 7, 2019) (Peebles, M.J.) (citing Krug v. Cnty. of Rennselaer, 559 F. Supp. 2d 223, 247 (N.D.N.Y. 2008)

(McAvoy, J.); Turczyn ex rel. McGregor v. City of Utica, 13-CV-1357, 2014 WL 6685476, at *2 (N.D.N.Y. Nov. 26, 2014) (Sharpe, J.); Hoisington v. Cnty. of Sullivan, 55 F. Supp. 2d 212, 214 (S.D.N.Y. 1999) ("Under New York la w, a department of a municipal entity is merely a subdivision of the municipality and has no separate legal existence. Therefore, municipal departments like the Department of Social Services are not amenable to suit and no claims lie directly against the Department.")) ("A lthough a municipality is subject to suit pursuant to section 1983, see Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978), a municipal . . . department does not have the capacity to be sued as an entity separate from the municipality in which it is located."), report and recommendation adopted, 2019 WL 974824 (N.D.N.Y. Feb. 28, 2019) (Suddaby, C.J.). As a result, I recommend that Plaintiff's claims against Defendant BPD be dismissed because it is not an entity amenable to suit. 6

E. Additional Legal Grounds Listed The Complaint also mentions the Fifth Amendment, Seventh Amendment, and Ninth Amendment. Based on my review, the Complaint fails to allege facts plausibly suggesting any claims pursuant to these legal bases.

"The Fifth Amendment protects against com pulsory self-incrimination by forbidding the introduction of coerced statements into evidence at trial." Harris v. Doe, 24-CV-0151, 2024 WL

6 Even if Plaintiff's claims against Defendant BPD were liberally construed as against the City of Binghamton, I would recommend that they be dismissed. There is no basis for municipal liability alleged in the Complaint. Plaintiff essentially complains of a discrete incident, during which an officer or individual employed by Defendant BPD did not act properly. (See generally Dkt. No. 1.) There is no indication that Plaintiff can assert a policy or custom which would support municipal liability based on these facts. In addition, none of Plaintiff's allegations reflect a failure to train or "deliberat e indifference" to the rights of persons who would come into contact with employees of the City of Binghamton.

20 1344697, at *3 (D. Conn. Mar. 29, 2024). Miranda 7

warnings are not constitutionally required and instead, were developed as a means to protect the Fifth Amendment right against compulsory self-incrimination. Harris, 2024 WL 1344687, at *3. "Although failure to give Miranda warnings may be reason to preclude evidence against a defendant at a criminal trial, 'the failure to give Miranda warnings does not create liability under § 1983.'" Spicer v. Burden, 564 F. Supp. 3d 22, 30 (D. Conn. 2021) (quoting Neighbour v. Covert, 68 F.3d 1508, 1510 (2d Cir. 1995) (per curiam)); see Chavez v. Martinez, 538 U.S. 760, 772 (2003) (explaining that the Fifth Amendment only forbids introduction of coerced statements at trial, so failure to provide Miranda warnings does not violate suspect's constitu tional rights and "cannot be grounds for a § 1983 action").

The Seventh Amendment preserves "the right to trial by jury " for certain cases brought in federal

court. U.S. Const. amend. VII. Since the federal judiciary determines the extent to which a litigant in federal court may try his or her case before a jury, see e.g., Messa v. Goord, 652 F.3d 305 (2d Cir. 2011), persons acting under the color of state law (i.e., those persons who may be named as defendants in a § 1983 action) generally lack the capacity to violate the Seventh Amendment. See Kampfer v. Argotsinger, 18-CV-0007, 2020 WL 906274 at *10 (N.D.N.Y. Feb. 25, 2020) (The Seventh Amendment does not "provide a [. . .] cause of action cognizable under § 1983." (citati on and quotation omitted)). As a result, I recommend that "'Plaintiff's citation to the Seve nth Amendment [be construed] as support for h[is] request for a civil jury trial,' rather than as an independent basis for relief." Kampfer, 2020 WL 906274, at *10 (citing White v. City of New York, 13-CV-7156, 2014 WL 4357466, at *8 n.13 (S.D.N.Y. Sept. 3, 2014)).

7 Miranda v. Arizona, 384 U.S. 436 (1966).

21 "The Ninth Amendment cannot serve as the basis for a § 1983 claim." Rodriguez v. Burnett, 22-CV-10056, 2024 WL 1466880, at *7 (S.D.N.Y. Apr. 4, 2024) (citing Lloyd v. Lee, 570 F. Supp. 2d 556, 566 (S.D.N.Y. 2008)). V. OPPORTUNITY TO AMEND

Generally, a court should not dismiss claims contained in a complaint filed by a pro se litigant without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." Branum v. Clark, 927 F.2d 698, 704-05 (2d Cir. 1991); see also Fed. R. Civ. P. 15(a)(2) ("The c ourt should freely give leave when justice so requires."). An opportunity to ame nd is not required, however, where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000); see also Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice."). Stated differently, "[w]here it a ppears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993); accord, Brown v. Peters, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.). 8

Here, better pleading could not cure the deficiencies described above with respect to the following claims: (1) malicious prosecution claim pursuant to the Fourth Amendment and 42

8 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.) (explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999)—that th e Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)), rev'd on other grounds , 682 F. App'x 30.

22 U.S.C. § 1983 against Defendants Seiden, Binghamton City Court, Wage in his official capacity,

DA, and BPD; (2) conditions of confinement claim pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 against Defendants Seiden, Binghamton City Court, Wage in his official capacity, DA, and BPD; (3) ADA claim against Defendants Seiden, Wage, and Sturtz; (4) Title VI of the Civil Rights Act claim against Defendants Seiden, Wage, and Sturtz; and (5) claims pursuant to N.Y. Penal Law § 195.00 and 18 U.S.C. § 241. As a result, I recommend that those claims be dismissed without leave to replead.

Out of an abundance of caution and in deference to Plaintiff's pro se status, the undersigned recommends that Plaintiff be granted leave to amend the following claims to cure the defects as stated above: (1) malicious prosecution claim pursuant to the Fourth Amendment and 42 U.S.C. § 1983 against Defendant Sturtz; (2) conditions of confinement claim pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 against Defendants Wage in his individual capacity and Defendant Sturtz; (3) ADA claim against Defendants DA, BPD, and Binghamton City Court; and (4) Title VI of the Civil Rights Act claim against Defendants DA, BPD, and Binghamton City Court.

If Plaintiff chooses to avail himself of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which he relies to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the amended complaint must include allegations reflecting how the individual(s) named as Defendant(s) are involved in the allegedly unlawful activity. Finally, Plaintiff is informed that any amended complaint will replace the existing Complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that

23 an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (internal quotation marks omitted)). ACCORDINGLY, it is ORDERED that Plaintiff's amended IFP application (Dkt. No. 7) is GRANTED; and it is further respectfully

RECOMMENDED that the Court ACCEPT FOR FILING the Complaint (Dkt. No. 1) to the extent that it asserts a malicious prosecution claim pursuant to the Fourth Amendment and 42 U.S.C. § 1983 against Defendant Wage in his individual capacity; and it is further respectfully

RECOMMENDED that the Court DISMISS WITH LEAVE TO AMEND the Complaint (Dkt. No. 1) to the extent that it asserts the following claims: (1) malicious prosecution claim pursuant to the Fourth Amendment and 42 U.S.C. § 1983 against Defendant Sturtz; (2) conditions of confinement claim pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 against (a) Defendant Wage in his individual capacity, and (b) Defendant Sturtz; (3) ADA claim against Defendants DA, BPD, and Binghamton City Court; (4) Title VI of the Civil Rights Act claim against Defendants DA, BPD, and Binghamton City Court, for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e); and it is further respectfully

RECOMMENDED that the Court DISMISS WITHOUT LEAVE TO AMEND the Complaint (Dkt. No. 1) to the extent that it asserts the following claims: (1) malicious prosecution claim pursuant to the Fourth Amendment and 42 U.S.C. § 1983 against Defendants Seiden, Binghamton City Court, Wage in his official capacity, DA, and BPD; (2) conditions of confinement claim pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 against Defendants Seiden, Binghamton City Court, Wage in his official capacity, DA, and BPD; (3)

24 ADA claim against Defendants Seiden, Wage, and Sturtz; (4) Title VI of the Civil Rights Act claim against Defendants Seiden, Wage, and Sturtz; and (5) claims pursuant to N.Y. Penal Law § 195.00 and 18 U.S.C. § 241, because it seeks relief from individuals who are immune from such relief, and is otherwise frivolous pursuant to 28 U.S.C. § 1915(e); and it is further

ORDERED that the Clerk of the Court shall file a copy of this Order and Report- Recommendation on Plaintiff, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009) (per curiam).

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. 9

Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993) (citing Small v. Sec'y of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989)).

Dated: June __, 2024

Binghamton, New York

9

If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

Footnotes 1 Although Plaintiff is currently proceeding pro se, the Court notes that he had counsel when preparing his

response to Defendant's motion for summary judgment. Accordingly, no need exists to construe

Plaintiff's response with the special solicitude ordinarily afforded to pro se litigants. 2 The Court notes that, while it did not previously (i.e., in its prior decisions) liberally construe Plaintiff's

retaliation claim as arising under three separate theories, it does so now. The Court further notes that it has the power to address these two additional theories for each of two alternative reasons: (1) because Defendants moved for dismissal of Plaintiff's retaliation claim in its entirety, Plaintiff has had sufficient notice and an opportunity to be heard with respect to the two theories in question; and (2) in any event, even if Plaintiff cannot be said to have had such notice and an opportunity to be heard, he filed his Complaint pro se and the Court finds the two theories to be so lacking in arguable merit as to be frivolous, see Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000) (recognizing that district court has power to sua sponte dismiss pro se complaint based on frivolousness notwithstanding fact that plaintiff has paid statutory filing fee). 3 As discussed above, Plaintiff was actually given three noise violations. However, because his permit was

revoked on the same day that he received the third violation, the Court will disregard the third violation for purposes of this analysis. 4 The Court notes that Plaintiff spends considerable time in his opposition papers disputing the sufficiency of the

evidence and procedures that were followed that led to the issuance of noise violations. (See generally Dkt. No. 67, ¶¶ 56-95 [Pl.'s Decl.].) However, this Court is not the proper forum for that dispute. Furthermore, to the extent that the New York Supreme Court observed that there appeared “to have been a disproportionate amount of time and money spent on [the noise violation] notice,” and that the records did not “reveal a real issue with dog-barking,” those observations are not binding upon this Court. (Dkt. No. 67, Attach. 2, at 6.) Setting aside the fact that the observations constitute dicta, Defendants have submitted admissible record evidence demonstrating that Mr. Ennis acted upon complaints made to him by residents of the Town, which Plaintiff has failed to properly dispute. 5 For example, with regard to this lack of additional evidence regarding retaliatory animus, Plaintiff has failed to

adduce admissible record evidence establishing that, even assuming Mr. Gleason knew of Plaintiff's intent to engage in protected speech, the so-called “manner of the interaction” by Mr. Gleason (i.e., the hand delivery of the letter) was in fact unusual for Mr. Gleason given the date of the letter and the date of the public meeting. Moreover, Plaintiff has failed to adduce admissible record evidence that the so-called “timing ... of the interaction” is significant, given his rather constant exercise of his First Amendment rights during the time in question. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff is still financially responsible for any other fees or costs she may incur. 2 It appears that the EEOC dismissal notice is dated September 10, 2020. Dkt. No. 1-1. 3 A plaintiff establishes “a prima facie case of discrimination by showing that (1) he is a member of a protected

class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving

rise to an inference of discrimination based on his membership in the protected class." Dawson v. Bumble

& Bumble, 398 F.3d 211, 216 (2d Cir. 2005) overruled on other grounds Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018). 4 As the EEOC dismissal notice is dated September 10, 2020, the Court makes the reasonable inference that

plaintiff filed her EEOC complaint some time in 2020. 5 Even if this Court were to assess this case as seeking to proceed under diversity jurisdiction pursuant to 28

U.S.C. § 1332(a), the plaintiff has also failed to set forth a cognizable state law claim. Scherer v. Equitable Life Assur. Soc'y of the United States, 347 F.3d 394, 397 (2d Cir. 2003) (quoting 28 U.S.C. § 1332(a)) (noting that diversity jurisdiction "confers original jurisdiction on the federal district courts with respect to 'all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States.' "). 6 This "emergency motion" notes that it is presented to the United States Supreme Court, but contains a caption

including this Court. It is unclear if this is a document plaintiff intends to submit before this Court, or before the United States Supreme Court. See dkt. no. 5. 7 If you are proceeding pro se and are served with this Report-Recommendation & Order by mail, three (3)

additional days will be added to the fourteen (14) day period, meaning that you have seventeen (17) days from the date the Report-Recommendation & Order was mailed to you to serve and file objections. FED. R. CIV. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Id. § 6(a)(1)(c). End of Document

Footnotes

1 At paragraph 3(a) asking to identify the defendant, plaintiff writes: "Not Applicable" 2 Dkt. no. 11-4 is a letter from Maureen Kielt, Director of the EEOC Buffalo Local Office to plaintiff in the matter

of Walker v. CIBC confirming that plaintiff indicated that her "last date of harmed occurred on March 24, 2009, when [she] was terminated," thus making her EEOC administrative claim against CIBC untimely. Dkt. No. 11-4 at 1. 3 In the Prayer for Relief, plaintiff requests the Court to grant the following relief:

1. The plaintiff do not [sic] want to be a party to the religious killing business of Myrna Suzette Walker; her five children; and CIBC First Caribbean Jamaica staff, Allison Carolyn Rattray and her husband Judge Barrington Andrew Rattray, Supreme Court of Jamaica; 2. The plaintiff do not [sic] want cocaine nor any thing to ingest from anyone, by force or otherwise. 3. The plaintiff wants full restitution socially, physically, professionally. Dkt. 11, at 5 (emphasis in original). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The language of that section is ambiguous because it suggests an intent to limit availability of in forma

pauperis status to prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such

prisoner possesses"). The courts have construed that section, however, as making in forma pauperis status

available to any litigant who can meet the governing financial criteria. Hayes v. United States, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); Fridman v. City of N.Y., 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002). 2 Plaintiff is reminded that, although his application to proceed in forma pauperis has been granted, he is still

required to pay fees that he may incur in this action, including copying and/or witness fees. 3 It is unclear at this juncture whether Plaintiff's claims against Defendant Oneida County Sheriff in his

official capacity, should be deemed as claims against the County of Oneida or the Oneida County Sheriff's Department. Compare Carthew v. Cnty. of Suffolk, 709 F. Supp. 2d 188, 195 (E.D.N.Y. 2010) ("It is well settled that an entity such as the Suffolk County Police Department is an 'administrative arm' of the same municipal entity as Suffolk County and thus lacks the capacity to be sued."), and Krug v. Cty. of Rennselaer, 559 F. Supp. 2d 223, 247 (N.D.N.Y. 2008) (McAvoy, J.) ("A city police department is not an independent, suable entity separate from the municipality in which the police department is organized."), with DiJoseph v. Erie Cnty., 18-CV-0919S, 2020 WL 4194136, at *8 (W.D.N.Y. July 21, 2020) (noting that "[u]nder New York State Constitution article XIII, § 13(a) a county cannot be made liable for the acts of its sheriff" and finding that the County—absent a local law agreeing to assume liability for the Sheriff's actions—is not the proper defendant in a claim pursuant to 42 U.S.C. § 1983 against the Sheriff). However, this distinction is immaterial for purposes of this Order and Report-Recommendation. 4 Before Tangreti, various courts in the Second Circuit have postulated how, if at all, the Iqbal decision affected

the five Colon factors which were traditionally used to determine personal involvement. Pearce v.

Estate of Longo, 766 F. Supp. 2d 367, 376 (N.D.N.Y. 2011) (Hurd, J.) (recognizing that several district courts in the Second Circuit have debated Iqbal's impact on the five Colon factors), rev'd on other grounds sub nom., Pearce v. Labella, 473 F. App'x 16 (2d Cir. 2012) (summary order); Kleehammer v. Monroe Cnty., 743 F. Supp. 2d 175, 185 (W.D.N.Y. 2010) (holding that "[o]nly the first part of the third Colon categories pass Iqbal's muster...."); D'Olimpio v. Crisafi, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) (disagreeing that Iqbal eliminated Colon' s personal involvement standard). 5 Section 1985(1) provides a damages action against two or more persons who conspire to prevent, by force,

intimidation or threat, any federal officer from performing his or her official duties. Section 1985(2) provides a cause of action against two or more persons who conspire to obstruct justice in the federal courts by force, intimidation, or threat. None of the facts alleged in the Amended Complaint relate in any way to these causes of action. 6 Under General Order #14 and N.D.N.Y. L.R. 9.2, a party who files a RICO claim must also file a Civil RICO

statement within thirty days after the filing date of the Complaint. Despite thirty days having elapsed since the filing of his Amended Complaint (and his Complaint, which also appeared to assert a RICO claim [Dkt. No. 1 at 25-26]), Plaintiff has failed to file a Civil RICO statement. (See generally docket sheet.) As a result, I recommend that Plaintiff's RICO claim be dismissed. See Poole v. Bendixen, 20-CV-0697, 2021 WL 3737780, *12 (N.D.N.Y. Aug. 24, 2021) (Suddaby, C.J.); Murphy v. Onondaga Cnty., 18-CV-1218, 2022 WL 819281, *6 (N.D.N.Y. Mar. 18, 2022) (Sharpe, J.). 7 For example, to demonstrate that Defendants engaged in extortion, Plaintiff must allege that Defendants

"obstruct[ed], delay[ed], or affect[ed] commerce or the movement of any article or commodity in commerce, by ... extortion or attempt[ed] or conspire[d] so to do, or commit[ted] or threaten[ed] physical violence to any person or property in furtherance of a plan or purpose to do [so]." 18 U.S.C. § 1951; see also McLaughlin v. Anderson, 962 F.2d 187, 194 (2d Cir. 1992). Extortion is defined as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2); Entretelas Americanas S.A. v. Soler, 19-CV-3658, 2020 WL 9815186, at *10 (S.D.N.Y. Feb. 3, 2020), aff'd, 840 F. App'x 601 (2d Cir. 2020), as amended (Jan. 7, 2021) (citation

omitted). "[F]atal" to an extortion claim is "[t]he absence of allegations of force, violence or fear." Entretelas

Americanas, 2020 WL 9815186, at *10 (collecting cases). 8 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.)

(explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999)— that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544

(2007)), rev'd on other grounds, 682 F. App'x 30. 9 The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein in accordance with

Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009) (per curiam). 10 If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional

days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The following facts are taken from the Complaint, exhibits to the Complaint, and public records, which the

Court may consider in evaluating Hall's claims. See Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006). 2 Hall asserts claims under 18 U.S.C. §§ 241 and 242. These sections establish criminal liability for certain

deprivations of civil rights and conspiracy to deprive civil rights. Molina v. City of Lancaster, 159 F. Supp. 2d 813, 818 (E.D. Pa. 2001); Figueroa v. Clark, 810 F. Supp. 613, 615 (E.D. Pa. 1992); see United States v. Philadelphia, 644 F.2d 187 (3d Cir. 1980) (declining to create civil remedy under 18 U.S.C. §§ 241 and 242). However, a plaintiff cannot bring criminal charges against defendants through a private lawsuit, and these sections do not give rise to a civil cause of action. U.S. ex rel. Savage v. Arnold, 403 F. Supp. 172, 174 (E.D. Pa. 1975). Hall also cites 18 U.S.C. § 71, which relates to theft from interstate shipments. The Court assumes that he intended to cite 18 U.S.C. § 371, relating to conspiracy, which also does not provide for a private right of action. See Walthour v. Herron, No. 10-1495, 2010 WL 1877704 at *3 (E.D. Pa. May 6, 2010) (no private right of action exists under 18 U.S.C. §§ 241, 242, 245, 247, 371 or 1951); Jones v. Lockett, No. 08-16, 2009 WL 2232812 at *8 (W.D. Pa. July 23, 2009) ("It is clear that the criminal statutes invoked by Plaintiff, i.e., 18 U.S.C. §§ 241, 371 and 1341 do not provide for a private cause of action.") Hall also cites 18 U.S.C. § 1519 relating to destroying, altering or falsifying documents in a federal investigation, and 18 U.S.C. § 1623 relating to perjury, which also do not provide a private right of action. Antonelli v. Kennedy Hosp., No. 17-13780, 2018 WL 443455, at *2 (D.N.J. Jan. 16, 2018) (no private right of action under 18 U.S.C. 1519). 3 Although Bivens provides a remedy against federal actors, "[a]n action against government officials in their

official capacities constitutes an action against the United States; and Bivens claims against the United States are barred by sovereign immunity, absent an explicit waiver." Lewal v. Ali, 289 F. App'x 515, 516 (3d Cir. 2008) (per curiam); see also F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); Ynfante v.

United States, Civ. A. No. 13-767, 2015 WL 631055, at *5 (M.D. Pa. Feb. 12, 2015) ("[A] Bivens claim can only be asserted against individual officials."). Accordingly, the constitutional claims against the Defendants in their official capacities are in essence claims against the United States that must be dismissed on sovereign immunity grounds. See Brooks v. Bledsoe, 682 F. App'x 164, 169 (3d Cir. 2017) (per curiam) ("To the extent that Brooks is suing the BOP employees in their official capacities, his claim fails as actions against prison officials in their official capacities are considered actions against the United States, and Bivens claims against the United States are barred by sovereign immunity, absent an explicit waiver."); Bell v. Rossott, 227 F. Supp. 2d 315, 320 (M.D. Pa. 2002) (dismissing claim against individual federal defendants sued in their official capacity because the claims are essentially made against the United States). 4 The Court notes that "[m]otions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal

prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution," although § 2241 may be used when the remedy provided by § 2255 is "inadequate or ineffective." Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). In other words, a § 2255 motion is the proper way to challenge a federal conviction, rather than a Bivens action. See Okoro v. Callaghan, 324 F.3d 488, 490 (7th Cir. 2003) ("Okoro adhered steadfastly to his position that there were no drugs, that he was framed; in so arguing he was making a collateral attack on his conviction, and Heck holds that he may not do that in a civil suit, other than a suit under the habeas corpus statute or its federal-defendant equivalent, 28 U.S.C. § 2255."); Beverly v. Reno, 23 F.3d 158, 159 (7th Cir. 1994) (federal prisoner cannot circumvent § 2255 "by bringing an independent civil action"); see generally Abbasi, 137 S. Ct. at 1863 ("[W]hen alternative methods of relief are available, a Bivens remedy usually is not."). The Court will not construe Hall's Complaint as such a motion because the sentencing Judge is in a better position to determine the validity of any challenges to his conviction. Furthermore, this Court does not possess the authority to revoke or alter an order issued by a

federal judge in another federal proceeding. See Smith v. Meyers, 843 F. Supp. 2d 499, 505 (D. Del. 2012)

("The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction."). 5 There are other reasons why Hall's claims fail. Notably, judges are entitled to absolute immunity from liability

based on acts or omissions taken in their judicial capacity, so long as they do not act in the complete absence of all jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 355-56 (1978). Similarly, prosecutors are entitled to absolute immunity from liability for acts that are "intimately associated with the judicial phase of the criminal process" such as "initiating a prosecution and ... presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); see also See Van de Kamp v. Goldstein, 555 U.S. 335, 348-49 (2009). However, the Court need not address these or other defects in Hall's Complaint as alternative reasons for dismissal. Moreover, to the extent the Complaint could be

construed as raising claims based on the DEA's investigation consideration of which would not be barred by Heck, it is apparent from the face of the Complaint that those claims are time-barred because Hall knew or should have known of those violations more than two years before he filed the Complaint in the instant action. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 After the 1996 amendments to Section 1983, it is clear that a judicial officer may be sued in his official

capacity for injunctive relief (i.e., non-monetary damages), but only where a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983; Catanzaro v. Cottone, 228 Fed. App'x 164, 167 (3d Cir.2007). This is a very narrow avenue for relief and Plaintiff has failed to adequately allege that a declaratory decree was violated or that declaratory relief was unavailable to him. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff's exhibits do not provide a basis to change this conclusion. Dkt. No. 15.

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Footnotes 1 Plaintiff is reminded that, although her IFP Application has been granted, she will still be required to pay fees

that she may incur in this action, including copying and/or witness fees. 2 The Court assumes Plaintiff is referring to St. Joseph's Health Hospital. The address that Plaintiff has listed

for this Defendant is that of St. Joseph's Health Hospital. The Court takes judicial notice of the fact that St. Joseph's Health Hospital is a regional non-profit health care system based in Syracuse, New York, and is part of Trinity Health, the nation's second-largest Catholic Health System. See https://www.sjhsyr.org/about- us/ (last visited Apr. 4, 2022); see also Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 127 F. Supp. 3d 156, 167 (noting that, for the purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), “a court may take judicial notice of information publicly available on a party's website, as long as the website's authenticity is not in dispute and ‘it is capable of accurate and ready determination.’ ”).

3 Plaintiff may be referring to the Comprehensive Psychiatric Emergency Program, also known

as “CPEP”. See https://www.sjhsyr.org/location/st-josephs-health-hospital-comprehensive-psychiatric-emergency-program-cpep (last visited Apr. 4, 2022). 4 See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) (the complaint is deemed to

include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference). 5 Based on the facts alleged, Plaintiff could not proceed with a claim under Title I of the ADA, which addresses

employment discrimination, because she has not alleged that she was employed by Defendants. 42 U.S.C. § 12117; see Mary Jo C. v. New York State and Local Retirement Sys., 707 F.3d 144, 169 (2d Cir. 2013) ("Title I of the ADA expressly deals with th[e] subject of employment discrimination....") (citation and internal quotation marks omitted). Title II of the ADA covers disability discrimination in public services, programs, and activities, defined as "state or local governments and their instrumentalities." Sherman v. Black, 510 F. Supp. 2d 193, 197 (E.D.N.Y. 2007) (citing 42 U.S.C. § 12131(1)). However, "[a] private hospital performing services pursuant to a contract with a municipality[,] even if it does so according to the municipality's rules and under its direction, is not a creature of any governmental entity." Green v. City of New York, 465 F.3d 65, 79 (2d Cir. 2006). Moreover, Title IV of the ADA does not appear to be applicable to Plaintiff's claims because Title IV prohibits disability discrimination in telecommunications. See Genco v. Sargent & Collins LLP, No. 18-CV-0107, 2018 WL 3827742, at *3, n.5 (W.D.N.Y. June 4, 2018). Lastly, Title V of the ADA, sometimes referred to as the "retaliation provision," also does not appear applicable because Plaintiff does not allege that she engaged in activity protected by the ADA, that Defendants were aware of that activity, or any causal connection between the allegedly adverse actions that Defendant took against her and the protected activity. See Chiesa v. New York State Dep't of Labor, 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.). 6 Under the ADA, the term "disability" means "a physical or mental impairment that substantially limits one

or more major life activities of such individual." 42 U.S.C. § 12102. A physical or mental impairment can be "[a]ny mental or psychological disorder, such as an intellectual disability [or an] emotional or mental illness[.]" 29 C.F.R. § 1630.2(h)(2). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending speaking, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102. 7 If the District Court adopts this Report-Recommendation, and if Plaintiff chooses to file an amended complaint,

the pleading must comply with Rules 8 and 10 of the Federal Rules. The revised pleading will replace the original complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect."). The revised pleading should not attempt to resurrect any claims dismissed with prejudice in this action Additionally, although Plaintiff may submit objections to this Report-Recommendations, see infra, Plaintiff should wait for the District Court to rule on this Report- Recommendation before submitting an amended pleading. 8 If you are proceeding pro se and are served with this Order and Report-Recommendation by mail, three

additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. 6(a)(1)(C). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

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Footnotes 1 The court may "take judicial notice of relevant matters of public record." Giraldo v. Kessler, 694 F.3d

161, 164 (2d Cir. 2012). The publicly available information on the DOC website shows that Plaintiff was sentenced on November 30, 2022, to a term of incarceration that has not yet expired. See "Connecticut State Department of Correction: Inmate Information," available at http://www.ctinmateinfo.state.ct.us/ detailsupv.asp?id_inmt_num=327592 [https://perma.cc/ZRB3-G7TZ] (last visited Jan. 31, 2024). 2 Plaintiff filed a first amended complaint in March 2023, and then amended the complaint again thereafter in

May 2023. Although he did not seek leave before filing the second amended complaint, the court accepts the May filing as the operative pleading. 3 All factual allegations are drawn from the amended complaint and exhibits thereto and are considered true

for the purpose of this initial review. 4 Plaintiff's medical condition is not fully explained in the amended complaint itself, but additional detail can be

found in the grievance forms attached thereto. The court relies upon those attachments for clarity. 5 See Mayo Clinic, "Home Parenteral Nutrition," available at https://www.mayoclinic.org/tests-procedures/total-

parenteral-nutrition/about/pac-20385081 [https://perma.cc/7SKD-KMWM] (last visited Jan. 31, 2024). 6 Generally, a PICC line "is a long, thin tube that's inserted through a vein in [an individual's] arm and

passed through to the larger veins near [the] heart." Mayo Clinic, "Peripherally inserted central (PICC) line," available at https://www.mayoclinic.org/tests-procedures/picc-line/about/pac-20468748 [https://perma.cc/ SQM3-M5WE] (last visited Jan. 31, 2024). It provides a "doctor access to the large central veins near the heart ... [and is] used to give medications or liquid nutrition." Id. 7 It appears this device is the outlet for the PICC line. 8 Plaintiff actually asserts only that he was deprived of necessary treatment, but the court gathers that this is

a reference to the TPN. 9 Another nurse also apparently stated that she could only put him on

medical watch, or that he could refuse

housing. As this nurse is not a party to this action, this detail is not relevant to this discussion. 10 Plaintiff also alleges that he was sent to the emergency room on April 5, 2023, but it is not clear why.

11 Certain exhibits suggest that Plaintiff already may have a single cell, see, e.g., ECF No. 14 at CM/ECF p.

195, but that is unconfirmed. The court notes that it refers to the pagination supplied by the CM/ECF system because the amended complaint and exhibits are docketed as a single document. 12 He also alleges that nurses did not promptly address his wrist and leg pain, but this appears to be predicate

conduct only for his supervisory claims, which are addressed infra. 13 The only difference between the ADA and the RA is that the RA applies to entities receiving federal financial

assistance while Title II of the ADA applies to all public entities, a distinction not relevant here. See Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 320 n.13 (D. Conn. 2008); see also Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (finding it proper to consider such claims together). Where "distinctions between the statutes are not implicated," courts will "treat claims under the two statutes identically.' " Wright, 831 F.3d at 72 (quoting Henrietta D., 331 F.3d at 272). 14 In Garcia v. S.U.N.Y. Health Scis. Ctr. Of Brooklyn, 280 F.3d 98 (2d Cir. 2001), the United States Court of

Appeals for the Second Circuit held that a private individual could bring an official capacity ADA claim for damages against a state official, but only when the conduct also violates the Equal Protection Clause of the Fourteenth Amendment. Thereafter, in United States v. Georgia, 546 U.S. 151 (2006), the Supreme Court of the United States entertained, but specifically left open, the question of whether a Title II claim may proceed against a state official for conduct that violates the ADA, but not the Constitution. See Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis., 804 F.3d 178, 195 (2d Cir. 2015) (discussing, but not answering, whether Garcia survived Georgia). There is now a divergence in how district courts approach this issue. Id. 15 A "qualified individual with a disability" is defined as a disabled individual "who, with or without reasonable

modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The ADA further defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(2)(A). 16 In this motion, Plaintiff asks for the defendants to be served and a deadline to respond to be imposed, which

instructions are included in this order. 17 In this motion, Plaintiff asks the court to order the defendant medical staffers to withdraw as his healthcare

providers because they are denying his medical needs. As discussed supra, the denial of treatment appears to be a legitimate medical judgment, which the court will not disturb. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The Court may "take judicial notice of relevant matters of public record." Giraldo v. Kessler, 694 F.3d 161,

164 (2d Cir. 2012). The DOC website reflects that Plaintiff is an unsentenced detainee housed at Corrigan. 2 See Dehany v. Chagnon, No. 3:17-cv-00308 (JAM), 2017 WL 2661624, at *3 (D. Conn. June 20, 2017) (for

purposes of Section 1915A review, "[t]he Court must accept as true all factual matters alleged in a complaint"). 3 Review of publicly-available information on the Connecticut Judicial Branch website shows

that Plaintiff's criminal case for these charges is pending. See Case detail for K10K- CR20-0368088-S available at: https://www.jud2.ct.gov/crdockets/CaseDetail.aspx?source=Pending & Key=ae4f9f3b-56ed-4bb3-aad0-8bae5f256d9c. 4 Plaintiff's criminal case for these charges is still pending. See Case detail for docket K10K-

CR20-0368197-S available at: https://www.jud2.ct.gov/crdockets/CaseDetail.aspx?source=Pending & Key=499a82cb-41a2-461c-8edd-ecd3527735c2. 5 In his claims, Plaintiff states that Defendants denied him equal protection of the law and violated his

Fourteenth Amendment rights under "section 1 of the Fourteenth Amendment." Section one of the Fourteenth Amendment, which is the Citizenship Clause, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Reading Plaintiff's allegations together, the Court construes Plaintiff's allegations as asserting denial of his right to due process and equal protection under the Fourteenth Amendment.

6 Absolute immunity does not apply to a prosecutor's "administrative duties and those investigatory functions

that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings[.]" Warney v. Monroe County, 587 F.3d 113, 121 (2d Cir. 2009) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993)); See Kalina v. Fletcher, 522 U.S. 118, 125–27 (1997) (holding that prosecutor was not protected by absolute immunity because she was acting as an investigator when

she signed a sworn affidavit attesting to the facts supporting an arrest warrant). Here, Plaintiff's claims arise from the Prosecutor Defendants' role as advocates in furthering their prosecutorial functions. 7 Nor can Plaintiff's allegations even generously be construed as alleging that Costello engaged in a conspiracy

with state actors. See Storck v. Suffolk Cnty. Dep't of Soc. Servs., 62 F. Supp. 2d 927, 940 (E.D.N.Y. 1999) (allegations of conspiracy can be neither vague nor conclusory, but must "allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the alleged conspiracy."); Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002). ("[C]onclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights" are insufficient.) End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The same analysis applies to Plaintiff's claim that Eckert failed to respond to his complaints about retaliation

by other, unnamed employees at Wende. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Genco has filed a separate suit in this Court against Starpoint alleging employment discrimination, retaliation

and failure to accommodate in violation of the Americans with Disabilities Act. (See Genco v. Starpoint Central School District, Case No. 1:17-CV-01168). Starpoint moved to dismiss plaintiff's pro se complaint. Today, the Court issued a Report recommending that Starpoint's motion to dismiss plaintiff's complaint be denied. (Case No. 1:17-CV-01168, Dkt. No. 26). Plaintiff further filed suit, also on a pro se basis, against the law firm of Webster Szanyi LLP. (See Genco v. Webster Szanyi, LLP, Case No. 1:18-CV-00093). Webster Szanyi, who is representing Starpoint in the course of plaintiff's employment discrimination lawsuit, moved to dismiss the complaint. Today, this Court issued a Report recommending that the complaint against Webster Szanyi be dismissed with prejudice. (Id. at Dkt. No. 18). It is also noted that plaintiff filed a previous employment discrimination lawsuit against Starpoint, in this Court, in March of 2013. In February of 2015, the Honorable William M. Skretny granted summary judgment in favor of Starpoint. See Genco v. Starpoint Central School District, 1:13-CV-301, 2015 WL 540217 (WDNY Feb. 10, 2015). 2 The complaint states that Michael P. Santa Maria, Ph.D. performed plaintiff's medical examination. (Dkt. No.

1). Defendant's response papers indicate that Dr. Santa Maria is a board-certified neuropsychologist and that he performed a neuropsychological evaluation and independent medical examination of plaintiff. (Dkt. No. 5). 3 The allegations and arguments in plaintiff's responses, like those in his complaint, lack clarity or coherence.

His disjointed narrative sets forth a litany of grievances against Starpoint, Sargent & Collins, and Dr. Santa Maria. He attaches various documents including letters from Sargent & Collins and Starpoint relative to his leave and fitness for duty examination, Dr. Santa Maria's report from his neuropsychological evaluation and independent medical examination, a "transcript" of the medical examination that plaintiff transcribed himself, HIPAA releases provided to Dr. Santa Maria, plaintiff's individualized education plan from when he was enrolled in the Starpoint School District, internet research regarding Dr. Santa Maria's practice and areas of specialty, a decision in a prior federal lawsuit filed by plaintiff against Starpoint, and information regarding the elements of the crime of filing a false instrument. As best the Court can ascertain, plaintiff's chief complaint against defendant is that by providing legal representation to Starpoint when plaintiff was placed on administrative leave, Sargent & Collins discriminated against him.

4 Also at that time, this Court heard oral argument as to the motion to dismiss and a request for a filing injunction

on behalf of Starpoint in Genco v. Starpoint Central School District, and oral argument as to the motion to dismiss in Genco v. Webster Szanyi LLP. 5 Likewise, the facts of this lawsuit have nothing to do with the other four titles of the ADA, which prohibit

disability discrimination in: (1) access to public services, programs and activities provided by public entities (Title II); (2) access to public accommodations, such as hotels and theaters, provided by private entities (Title III); and (3) telecommunications (Title IV). See 42 U.S.C. §§ 12101-12213. 6 Similarly, plaintiff has failed to establish any viable claim for relief against Sargent & Collins based upon

his allegations that the doctor who performed the fitness for duty examination was not a physician and that the examination was not performed in accordance with the New York State Civil Service Law or New York State Education Law. Plaintiff acknowledges in his complaint that Starpoint, his employer, placed him on administrative leave and sent him for a medical examination. No cause of action exists against Sargent & Collins for their role in facilitating the medical examination or communicating Starpoint's position to plaintiff or others. See Hills v. Praxair, Inc., 11-CV-678, 2012 U.S. Dist. LEXIS 74125 (WDNY May 29, 2012) (dismissing plaintiff's complaint against the attorneys who represented his employer in defense of plaintiff's EEOC charge because, inter alia, statements made in quasi-judicial proceedings, such as arguments submitted in response in an EEOC charge or while representing a client at a hearing, are protected by absolute privilege). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The Court's factual statement is drawn from Plaintiff's Complaint and Amended Complaint. Plaintiff's factual

allegations are presumed to be true for purposes of resolving a motion to dismiss. See Kassner v. 2nd

Ave. Delicatessen, Inc., 496 F.3d 229, 237 (2d Cir.2007). 2 Rosado has no claim against Herard in her individual capacity under these statutes. "[N]either Title II of the

ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials." Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir.2001); Keitt v. New York City, 882 F.Supp.2d 412, 426 (S.D.N.Y.2011) ("Individuals in their personal capacities are not proper defendants on claims brought under the ADA or the Rehabilitation Act.") (citing Harris v. Mills, 572 F.3d 66, 72–73 (2d Cir.2009)). Less clear is whether claims for monetary damages are available against Herard in her official capacity. The Second Circuit has held that "a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." Garcia, 280 F.3d at 112. Some courts in this District have extended this holding to individuals sued in their official capacities. See Degrafinreid v. Ricks, 417 F.Supp.2d 403, 411 (S.D.N.Y.2006), on reconsideration on other grounds, 452 F.Supp.2d 328 (S.D.N.Y.2006) ("Since the ADA permits official capacity suits, [plaintiff] can pierce Defendant's claim of state sovereign immunity and recover money damages under Title II, provided he satisfies the standard set forth in [United States v. Georgia, 546 U.S. 151 (2006).]"); see also Johnson v. Goord, No. 01 Civ. 9587 PKC, 2004 WL 2199500, at *19 (S.D.N.Y. Sept. 29, 2004) ("[P]laintiffs' claims against the individual defendants in their official capacities under section 504 of the Rehabilitation Act and Title II of the ADA fail because those laws do not provide for money damages against the state or state officials in their official capacities, absent a showing that any violation was motivated by discriminatory animus or ill will due to the disability."). Other courts have concluded that monetary damages are available against individuals in their official capacities under the ADA, but not under the Rehabilitation Act. See Gowins v. Greiner, No. 01 Civ. 6933(GEL), 2002 WL 1770772, at *5 (S.D.N.Y. July 31, 2002) ("[Plaintiff] may not sue DOCS under ... the Rehabilitation Act at all, and may sue DOCS under the ADA only to the extent that the alleged violation resulted from discriminatory animus based on his disability."). This Court need not resolve the official capacity issue here. Even reading Plaintiff's pleadings liberally, he has not asserted that he was denied access to therapeutic group sessions because of a disability. 3 "In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court ...

may ... consider matters of which judicial notice may be taken under Fed.R.Evid. 201.... [C]ourts routinely take judicial notice of documents filed in other courts, ... not for the truth of the matters asserted in the other

litigation, but rather to establish the fact of such litigation and related filings." Kramer v. Time Warner Inc.,

937 F.2d 767, 773–74 (2d Cir.1991) . 4 The pages numbers referenced in this opinion are the numbers assigned when the document was

electronically filed. 5 Judge Maas correctly rejected Defendant's argument that Plaintiff alleges discrimination based on language

rather than ethnicity. See Rosado, 2013 WL 6170631, at *6. Although Plaintiff refers to himself and certain other detainees as "Spanish speakers," he repeatedly contrasts this group with "African Americans." (See, e.g., Am. Cmplt. (Dkt. No. 25) ¶ 12) Accordingly, the classification Plaintiff alleges is one based on ethnicity, and not language. This case is thus distinguishable from Soberal–Perez v. Heckler, 717 F.2d 36, 41 (2d Cir.1983)—cited by Defendant—because in that case "[a] classification [was] ... made ... on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin." 6 Defendant argues that this ruling is inconsistent with the dismissal of Plaintiff's privacy claim. This argument

ignores the fact that Plaintiff's privacy and First Amendment retaliation claims involve different rights. The retaliation claim implicates Plaintiff's freedom to engage in constitutionally protected activity—here, First Amendment speech—while Plaintiff's privacy claim is based on his "individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). While Plaintiff waived his privacy claim by filing court papers disclosing his H.I.V. status, it does not follow that he waived his right to be free of retaliation for engaging in First Amendment speech. The relevant question for purposes of Plaintiff's retaliation claim is whether disclosure of Plaintiff's H.I.V. status to other detainees—individuals who were housed in the same facility as Plaintiff and who did not know of his medical condition—"would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Dawes, 239 F.3d at 493. It is reasonable to infer that a similarly situated detainee might be deterred from filing a grievance if threatened with disclosure of his H.I.V. status to other detainees. The fact that detainees in the Mental Health Unit could have learned about Plaintiff's H.I.V. status from documents filed in Plaintiff's Florida court action does not change the analysis. 7 Defendant did not raise this argument in her objections to the R & R. Accordingly, to the extent that this

argument concerns Plaintiff's retaliation claim, this Court will review the Magistrate Judge's determination for clear error. As to Plaintiff's equal protection claim, Judge Maas determined that that claim should be dismissed and did not reach the issue of damages. Accordingly, as to Plaintiff's equal protection claim, this Court will consider Defendant's PLRA argument de novo. 8 Herard argues that Rosado's claims for injunctive and declaratory relief are moot because Rosado has been

transferred from the Mental Health Unit at the George R. Vierno Detention Center, where the alleged events occurred. (Def. Objections (Dkt. No. 44) at 9) "In this circuit, an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." Salahuddin v. Goord, 467 F.3d 263, 272 (2d Cir.2006). The rationale for this rule is that—with the prisoner's transfer—"the problem sought to be remedied has ceased, and ... there is 'no reasonable expectation that the wrong will be repeated.' " Prins v. Coughlin, 76 F.3d 504, 506 (2d Cir.1996) (quoting Preiser v. Newkirk, 422 U.S. 395, 402 (1975)). However, both the George R. Vierno

Detention Center and the Anna M. Kross Center—where Rosado is currently housed— are Rikers Island facilities. It is not clear from the record whether Rosado continues to be under Herard's care, or will be under Herard's care again in the future, given that he is detained in a Rikers Island facility. Accordingly, Plaintiff's claims for injunctive and declaratory relief will not be dismissed as moot at this time. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Despite his IFP status in this action, plaintiff may still be responsible for any costs he may incur, such as

copying fees or witness fees. 2 Any unpublished decisions cited within this Report-Recommendation and Order have been provided to

plaintiff pro se. 3 Plaintiff submits his complaint on a form for a civil rights complaint pursuant to 42 U.S.C. § 1983, but does not

set forth any allegations of violations of his constitutional rights under color of state law pursuant to section 1983. See Compl. Instead, plaintiff attempts to set forth allegations pursuant to the Americans with Disabilities Act and Title VII. However, it appears plaintiff merely used this form out of convenience, and not in an attempt to set forth section 1983 claims. 4 The New York State Division of Human Rights was not named as a party to this action. 5 This Court's citation to the pages in the complaint are to the pagination generated by the Court's electronic

filing system at the top of each page, rather than to the pagination of the original document. 6 Copies of any unpublished decisions cited within this Report-Recommendation and Order have been provided

to plaintiff by the Court. 7 Although plaintiff must meet all prongs in order to have demonstrated a prima facie claim under Title II, the

undersigned will continue to assess whether plaintiff has met the third prong of Title II in order to assess whether plaintiff should be afforded an opportunity to amend. 8 The Second Circuit has declined to hold that Title VII's definition of prohibiting discrimination "because of ...

sex" includes sexual orientation. Zarda v. Altitude Express, ––– F.3d ––––, 2017 WL 1378932, at *2-3 (2d Cir. Apr. 18, 2017) (declining to overturn Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) to hold that Title VII sex discrimination includes prohibitions on sexual orientation discrimination); Anonymous v. Omnicom Group, Inc., ––– F.3d ––––, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) . 9 It is also noted that, even if Title VII applied, no private action may be brought against individuals in either

their personal or official capacity under Title VII. 10 Plaintiff has not attempted to set forth any

state-law sexual orientation discrimination claims. See, e.g., N.Y.

Exec. Law § 296(1)(a). Although it is possible that plaintiff may be able to allege such claims, as plaintiff has set forth no viable sexual orientation discrimination claims, opportunity to amend to provide a chance to assert potential state law claims is not recommended. 11 The undersigned also observes that plaintiff failed to demonstrate the efforts he took to find an attorney on

his own or attach correspondence supporting such attempts, despite signing his motion for appointment of

counsel stating that he had completed such actions and declar[ing] under penalty of perjury that the foregoing

is true and correct." Dkt. No. 3. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

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Footnotes 1 Defendants state, and Plaintiff does not dispute, that Cesar E. Chavez School – erroneously named as "Cesar

E. Chaves Elementary School" in the initial Complaint, (ECF No. 1 ("IC")), and Amended Complaint, (ECF No. 11 ("AC")) – is within YPS and therefore not a separate legal entity. (ECF No. 26 ("Ds' Mem.") at 1 n.1.) 2 At the pre-motion conference, Plaintiff's counsel had no explanation for why he had served Defendants with

an unsigned, unsealed "summons" that had not been issued by the Court, but in the interest of resolving the claims on the merits, I extended Plaintiff's time to serve to 21 days after the filing of the AC. 3 Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and

alterations. 4 Plaintiff's counsel acknowledges that Twombly and Iqbal are more recent than Conley v. Gibson, 355 U.S.

41, 45-46 (1957), yet seems to rely on Conley's statement that dismissal is not warranted unless it is apparent that Plaintiff can prove no set of facts that would entitle it to relief. (ECF No. 27 ("P's Opp.") at 9.) Conley's "no set of facts" standard, however, was "retire[d]" by the Supreme Court in Twombly, 550 U.S. at 562-63, and the applicable standard is now one of plausibility, see Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. No attorney should be citing to or relying on the "no set of facts" standard over a decade after it has been overruled. 5 The fifth claim in the AC is captioned "Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq." (AC

at 15.) This caption is puzzling, because § 2000d is Title VI of the Civil Rights Act, whereas Title VII is § 2000e. It is even more puzzling because I specifically told Plaintiff's counsel at the pre-motion conference to make clear under which Title Plaintiff was bringing her claim. "Title VI prohibits a recipient of federal funds from discriminating on the basis of race, color, or national origin." Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664 (2d Cir. 2012). Because Plaintiff in her fifth claim alleges that Defendants receive federal funds, (AC ¶ 76), and because at the pre-motion conference Defendants represented that no administrative

complaint had been filed, as would be required for a Title VII claim, I conclude that Plaintiff means to assert

a Title VI claim. 6 To the extent Plaintiff wishes to bring discrimination claims based on gender, those claims also fail. Gender

is not a protected class under § 1981. Anderson v. Conboy, 156 F.3d 167, 170 (2d Cir. 1998) (" Section 1981 does not prohibit discrimination on the basis of gender or religion, national origin, or age.") More fundamentally, the AC is devoid of any facts even faintly suggesting that Defendants discriminated on the basis of her gender. The same is true as to Plaintiff's religion (which she does not describe) and veteran status. 7 In addition, as Defendants point out, (ECF No. 28 ("Ds' Reply") at 4-5), Plaintiff does not address this argument

in her opposition, and thus has abandoned her Title VI claim. 8 "There is a 'personal interest' or 'personal stake' exception to the intracorporate conspiracy doctrine, however,

which permits a § 1985 claim where there are individuals who are 'motivated by an independent personal stake in achieving the corporation's objective.' " Salgado v. City of N.Y., No. 00-CV-3667, 2001 WL 290051, at *8 (S.D.N.Y. Mar. 26, 2001) (quoting Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71-72 (2d Cir. 1976)). Plaintiff does not allege that any such exception applies, and courts in this district have held that personal bias, by itself, is insufficient to defeat the intracorporate conspiracy doctrine. See Salgado, 2001 WL 290051, at *9 (officer defendants' derogatory remarks about plaintiff's sexual orientation were insufficient to properly allege "personal interest" exception to intracorporate conspiracy doctrine); Johnson v. Nyack Hosp., 954 F. Supp. 717, 723 (S.D.N.Y. 1997) ("[P]ersonal bias is not the sort of individual interest that takes a defendant out of the intraenterprise conspiracy doctrine," or else the exception would swallow the rule.). 9 The AC states that the directive to remain in her classroom (if indeed that is what Plaintiff was told, as opposed

to being required to stay in her room except for her free periods) followed "[s]oon after" the report, (AC ¶¶ 67-69), and that the verbal abuse "intensified" after the report, (id. ¶¶ 67, 72). But it also says that Delany "increased" her abuse "[s]tarting in 2009 and running through 2019," (id. ¶ 71), and that

Delany blackballed Plaintiff "[s]tarting in 2014 and running through 2019," (id. ¶ 73). It is hard to see how mistreatment after August 31, 2018 – which by Plaintiff's account was the continuation of years of increasing abuse – could be attributable to the protected activity. See Cayemittes v. City of N.Y. Dep't of Hous. Pres. & Dev., 974 F. Supp. 2d 240, 262 (S.D.N.Y. 2013) ("It is well-settled that an adverse employment action cannot serve as the basis for a retaliation claim if the action was set in motion before a plaintiff engaged in protected activity."), aff'd, 641 F. App'x 60 (2d Cir. 2016) (summary order). 10 To the extent Plaintiff meant to advance a claim of retaliation under New York Social Services Law § 413(c)

and New York Labor Law § 740 – and she makes no such suggestion in her opposition – it would be even further outside the statute of limitations, see Lomonoco v. Anne, No. 15-CV-1163, 2016 WL 4402029, at *6 (N.D.N.Y. Aug. 18, 2016) (no private right of action under N.Y. Social Services Law so Plaintiff must bring action under N.Y. Labor Law § 740) (collecting cases); Geldzahler v. N.Y. Med. Coll., 746 F. Supp. 2d 618, 630 (S.D.N.Y. 2010) ("The statute of limitations for bringing an action under Section 740 is one year after the alleged retaliatory action was taken"), and would fail for the same reasons as her other state-law claims, as discussed below. Plaintiff plainly did not intend to advance a claim of First Amendment retaliation, as her IC contained such claims, (IC at 8, 11-12), and they were removed in the AC. 11 To the extent this allegation could be interpreted as advancing a claim that the hostile work environment was

retaliation for this protest, it would fail for two reasons. First, as set forth in note 11 above, Plaintiff withdrew her First Amendment claims. Second, when teachers complain internally about their work conditions, they are speaking as employees, not citizens, and their speech does not constitute protected activity that can support a retaliation claim. See, e.g., Brooke v. County of Rockland, No. 21-598-CV, 2022 WL 6585350, at

*3-4 (2d Cir. Oct. 11, 2022); Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010); Geer v. Gates Chili

Cent. Sch. Dist., 577 F. Supp. 3d 147, 177 (W.D.N.Y. 2021). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Internal quotation marks omitted. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Varughese voluntarily dismissed another count for intentional infliction of emotional distress after Magistrate

Judge Francis ordered her to submit to a psychiatric evaluation as a condition of maintaining it. See Docket # 45. 2 Only the transcripts were submitted with the motion. By order dated March 13, 2015 (Docket # 215), the Court

ordered Varughese to produce the tapes so that I could listen to them myself, rather than merely reading the transcripts or relying on the parties' characterizations of what was said and how. See Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (appropriate for a court to take judicial notice of facts regarding intangible circumstances of an encounter preserved in audio-visual recordings if court reviews said recordings). 3 Varughese herself provided this document to the Court in a public filing. See Docket # 205–24. 4 In May 2011, after she made this complaint, Varughese was on rotation at the VA Hospital in the Bronx.

(Varughese Dep. at 127–128.) McCash was also there. (Id.) There is no evidence that he had any supervisory authority over Varughese, and it is undisputed that he and Varughese were kept apart. (Id.) While Varughese reports that McCash "glared" at her or "stomped" around her workplace, she did not report this to anyone. (Id.)

5 There is no evidence in the record that Schiller had any role in guiding the course of the Department's

investigation of the December 8 incident. The record is also devoid of evidence that Schiller had any role in placing Varughese on Academic Advisement. 6 It begins, "Well, we need some honesty and transparency then because, you know, you can't just have one

person, you know, saying whatever they want and doing whatever they want, such as on the moonlighting nights-I'm the primary moonlighter, really, then why does the schedule say somebody else is the primary moonlighter? You know, these are issues like, you need to address, like if you are going to have integrity you're going to have integrity across the board, if not, you're not." (Id.) It goes on for another paragraph in the transcript. 7 Jordan testified that a doctor's note was required whenever an absence prevented a resident from fulfilling

a departmental requirement or whenever the resident is out for three or more days (Jordan Dep. at 162); Morency testified that a note was not required unless the absence was longer than three days. (See Transcript of Internal Appeal at 158, Docket # 205–31 at 47.) Specifically, Morency was asked whether she ever asked Varughese "for proof ofillness since her absences precluded her from fulfilling a task?" She answers "No, because the policy is you have to miss three consecutive days and she only missed two, so I didn't ask her." (Id.) 8 Varughese's claim that the Staff Affairs Committee was a kangaroo court (see Varughese 56.1, passim), must

be assessed in light of her contemporaneous refusal to put any objection to the conduct of the proceedings when those objections could have been addressed. 9 I cannot fault the Hospital for failing to make records available if it did not do so, since this claim has arisen

at the last possible moment, long after the close of discovery. 10 Lento appears to have been responsible for Jordan's selection as Chief Resident. Varughese submits only

her own conclusory assertions of bias as against him. There is no evidence that McCash had anything to do with the decision, and Schiller was no longer acting as Chair. 11 These facts could also demonstrate that Varughese failed to meet her burden, at McDonnell–Douglas Stage

One, of proving, as part of her prima facie case, that she was qualified for the position. It really does not matter, however, whether one analyzes this as a Stage One or a Stage Three issue: there were significant differences between Jordan and Varughese that easily overcame her lesser experience. 12 One might ask whether the hospital's immediate corrective action is enough to save it from liability under

the NYCHRL. After all, it immediately removed Varughese from McCash's supervision and separated them moving forward. The answer is no, at least in the context of sexual harassment. See Zakrzewska v. New Sch., 14 N.Y.3d 469, 477, 902 N.Y.S.2d 838, 928 N.E.2d 1035, 1037–38 (2010) . In Zakrzewska, the state high court returned to the language of the city statute to find that "the affirmative defense to employer liability articulated in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) [does not] apply to sexual harassment and retaliation claims under section 8–107 of the New York City Administrative Code ." Id. (answering certified question from the Second Circuit in the negative). Of course, there is no Faragher– Ellerth defense under federal law to claims of discrimination, as opposed to harassment/retaliation CHECK; the pertinence of the Hospital's action is that the employer did not discriminat 13 McDonnell Douglas, 411 U.S. at 804; see also Ellis v. Long Island Rail Road Co., No. 05–CV–3847, 2008

WL 838766, at *4 (E.D.N.Y. Mar. 31, 2008) (citing Collins v. New York City Transit Auth., 305 F.3d 113, 119 n. 1 (2d Cir.2002)).

14 The evaluation was shown to persons who were deposed, including Dr. Fyfe of Robert Wood Johnson

Hospital, but that is a privileged act, taking place in the context of a lawsuit, where the witness (who was identified by Varughese) was being questioned about whether RWJ would have been willing to employ Varughese if the evaluation had been sent (it had not even been written yet when Varughese was discussing possible employment at RWJ). It is not actionable. End of Document

Footnotes 1 To the extent plaintiff's Bivens claim concerns employment discrimination (including hostile work

environment) at TSA, Title VII and the ADEA are his exclusive remedies and no Bivens cause of action may lie. See Brown v. Gen. Servs. Admin., 425 U.S. 820, 835, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (holding Title VII to be the "exclusive judicial remedy for claims of discrimination in federal

employment"); Briones v. Runyon, 101 F.3d 287, 289 (2d Cir.1996) ("Title VII is the exclusive remedy for discrimination by the federal government on the basis of race, religion, sex, or national origin."); Bumpus v. Runyon, No. 94 Civ. 2570(DC), 1997 WL 154053, at *4 (S.D.N.Y. April 2, 1997) ("ADEA provides the exclusive remedy for federal employees who allege age discrimination."). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff also seeks an order "restrain[ing] the [D]efendants from any further state court action until the federal

court dispute is adjudicated. Plaintiff also requests the court to vacate any state court judgments or orders in the interest of justice," (DE 8 at 21.) 2 The exhibits are largely excerpts from law treatises, copies of cases, and state and federal statutory laws,

well as several reports prepared on Plaintiff's behalf concerning the mortgage at issue in the underlying state case. See DE 1-1. 3 Plaintiff's Section 1983 claims against NYS are frivolous for the additional reason that New York State is not

a "person" within the meaning of Section 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (State is not a "person" for the purpose of § 1983 claims); Zuckerman v. Appellate Div., Second Dep't Supreme Court, 421 F.2d 625, 626 (2d Cir. 1970) (Court not a "person" within the meaning of 42 U.S.C. § 1983). 4 Given that the Eleventh Amendment and judicial immunity divest this Court of subject matter jurisdiction, the

Court need not address the application of the Rooker-Feldman doctrine and declines to do so. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 See N.Y.Crim. Proc. Law § 170.55. This disposition cannot be obtained without the consent of both parties

and the court. Id. 2 Shortly after filing the complaint, plaintiff filed what he entitled a "Table of Contents" which outlines the dates

of the various court filings and dispositions that are at issue in his complaint. This Court will treat this Table of Contents as a document attached to the complaint and incorporated by reference in the complaint. Chance v. Armstrong, 143 F.3d 698, 698 n. 1 (2d Cir.1998) ("the court may consider facts set forth in exhibits attached as part of the complaint as well as those in the formal complaint itself"); see Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir.1991) ("the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference"). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Even if not precluded by judicial immunity, it seems clear that one or both of plaintiff's claims against

defendants Connerton and Seidon would be precluded by the Rooker–Feldman doctrine, which precludes a federal court from asserting subject matter jurisdiction over a claim that is inextricably intertwined with a state court judgment. See McKithen v. Brown, 481 F.3d 89, 96 (2d Cir.2007). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Prisoners are not exempt from paying the full filing fee even when they have been granted permission to

proceed in forma pauperis. See 28 U.S.C. § 1915(b)(1). 2 See also Zuckerman v. Appellate Div., Second Dep't, Supreme Court, 421 F.2d 625, 626 (2d Cir. 1970)

(holding that a state court is not a "person" for the purpose of § 1983 liability). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 In addition to the instant natter, plaintiff has filed seven other actions in the Western and Northern Districts

of New York since 2001: Curto v. Town of Orchard Park, et al., 07-CV-255 (W.D.N.Y.); Curto v. Siwek, 06- CV-761 (W.D.N.Y.); Curto v. Bender, et al., 04-CV-26 (W.D.N.Y.); Curto v. Roth, 02-CV-1157 (N.D.N.Y.); Curto v. Edmundson, 01-CV-1824 (N.D.N.Y.); Curto v. Smith, 01-CV-1781 N.D.N.Y.); Curto v. Smith, 01- CV-1570 (N.D.N.Y.) 2 Plaintiff obtained waivers of service from defendants Phillip Marshall and the New York State Unified Court

System. (Docket No. 8). 3 Plaintiff indicates that the complaint filed by Palisades alleged that her address was "20 Hazel Court, West

Seneca, NY," the mailing address used by plaintiff in filing the instant lawsuit. She states that the action was dismissed by Buffalo City Court Judge Givens pursuant to § 213(a) and related provisions of the Uniform City Court Act, pursuant to which money actions may be filed in Buffalo City Court if plaintiff or defendant resides in Buffalo or, inter alia, a town contiguous to the city. Plaintiff asserts chat Judge Givens dismissed the action after taking judicial notice that the County of Erie's Internet Mapping Service indicated that plaintiff's address is in Orchard Park, not West Seneca, and that Orchard Park is not contiguous with Buffalo. (Amended Complaint ¶ 13).

4 Plaintiff is well-familiar with the nature and extent of judicial immunity, having had claims against New York

State judges dismissed in several previous actions. See, e.g., Curto v.Siwek, 06-CV-761S, 2007 U.S. Dist. LEXIS 60986, at *5-6 (W.D.N.Y. 2007) (Given plaintiff's knowledge, from the Court's dismissal of her previous action against Justice Burns, that New York State judges cannot be sued for judicial acts, her attempt to commence a very similar if not essentially identical lawsuit against Justice Burns' successor, Justice Siwek, can be properly regarded as frivolous within the meaning of 28 U.S.C. § 1915(e)(2)(B). Plaintiff is accordingly cautioned that the filing of any similarly frivolous actions against state judicial officers in the future may lead the Court to consider the imposition of appropriate sanctions."). 5 Indeed, Section 202 of the Uniform City Court Act provides that City Courts "shall have jurisdiction of actions

and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of liens on personal property where the amount sought to be recovered or the value of the property does not exceed fifteen thousand dollars exclusive of interest and costs." 6 The Court notes that plaintiff's claims that Judge Marshall conspired with other defendants would also

warrant dismissal because of their entirely conclusory nature, See, e.g., Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.") (qoting Dwares v. City of N.Y., 985 F.2d 94, 100 (2d Cir. 1993)). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Berton Saint–Fleur purports to bring this suit on behalf of both himself and his minor son Jermaine Saint–Fleur.

(Cplt.¶ Ill.) However, as this Court noted in a previous report and recommendation in this case, "it is doubtful that Mr. Saint–Fleur, as the non-custodial parent and whose parental rights appear to have been stripped, has standing to assert claims on behalf of the children." (Dkt. No. 11: 1/24/00 Report & Recommendation at 2.) The Court at this time sua sponte recommends that all claims brought by Berton Saint–Fleur against all parties on behalf of Jermaine Saint–Fleur be dismissed. 2 This section summarizes the relevant allegations in plaintiff Saint–Fleur's complaint, without resort to such

phrases as "the complaint alleges." 3 See also, e.g., Port Authority Trans–Hudson Corp. v. Feeney, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872

(1990) ("This Court has drawn upon principles of sovereign immunity to construe the [Eleventh] Amendment to 'establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as

well as by citizens of another state." ' '); Papasan v. Allain, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939

(1986);

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984); Edelman v. Jordan, 415 U.S. 651, 662–63, 94 S.Ct. 1347, 1355 (1974) ("While the [Eleventh] Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought by her own citizens as well as by citizens of another State.") (citing cases). 4 See also, e.g., United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir.1996) (New York State Education

Department and State Board of Regents entitled to Eleventh Amendment immunity); Jackson v. Johnson, 985 F.Supp. 422, 426 (S.D.N.Y.1997) (Kaplan, D.J. & Peck, M.J.) (New York State Department of Correctional Services entitled to Eleventh Amendment immunity, citing cases). 5 See also, e.g., Mathis v. Clerk of the First Dep't, 631 F.Supp. 232, 234 (S.D.N.Y.1986) ("the Appellate Division,

a state court, is not amenable to suit under 42 U.S.C. § 1983 ... on the grounds that it is immune from suit by virtue of the Eleventh Amendment"); Richards v. State of New York, 597 F.Supp. 692, 693 (E.D.N.Y.1984) (New York Court of Appeals immune under Eleventh Amendment), aff'd mem., 767 F.2d 908 (2d Cir.1985), cert. denied, 474 U.S. 1066, 106 S.Ct. 820 (1986). 6 "On the other hand, a suit against a state official in his official capacity based on federal law and seeking

prospective injunctive relief is not barred by the Eleventh Amendment." Jackson v. Johnson, 30 F.Supp.2d at 618; accord, e.g., Dube v. State University of New York, 900 F.2d at 595; Russell v. Dunston, 896 F.2d 664, 667–68 (2d Cir.) , cert. denied, 498 U.S. 813, 111 S.Ct. 50 (1990); Minotti v. Lensink, 798 F.2d at 609 ("The amendment does not prevent federal courts from granting prospective injunctive relief against state officials on the basis of federal claims."); Dwyer v. Regan, 777 F.2d at 835–36; Lora v. Greifinger, 96 Civ. 0628, 1997 WL 102473 at *

3 (S.D.N.Y. Feb 27, 1997); Thomas v. Held, 941 F.Supp. 444, 447 (S.D.N.Y.1996). For the reasons discussed in Point II below, even if Saint–Fleur were to seek leave to amend to sue a State judge solely for injunctive relief, the claim would have to be dismissed. 7

See also, e.g., Burgos v. Department of Children & Families, No. 3:98CV874, 2000 WL 145737 at *

2 (D.Conn. Feb. 7, 2000); Adams v. Bosco, 98 Civ. 8737, 1999 WL 165691 at *

2 (S.D.N.Y. March 25, 1999); Casaburro v. Giuliani, 986 F.Supp. 176, 182 (S.D.N.Y.1997); Fields v. Walthers, No. 94–CV–1659, 1997 WL 204308 at *

2 (N.D.N.Y. April 15, 1997) (Pooler, D. J.); Daisernia v. State of New York, 582 F.Supp. 792, 796 (N.D.N.Y.1984) ("The Supreme Court has consistently held ... that § 1983 does not abrogate the eleventh amendment immunity of states."). 8 Saint–Fleur's brief opposing the State's motion states

that "[a]lthough the judges' names are unknown,

plaintiff ... raised issues regarding '[t]he State of New York's appointed judges' being the guilty parties.... After the involved, unknown names are discovered, plaintiff, with leave from this court, will then amend the complaint to enter the names of the judges." (Saint–Fleur Br. at 5.) 9

See also, e.g., Sanchez–Preston v. Judge Luria, No. CV–96–2440, 1996 WL 738140 at *

4 (E.D.N.Y. Dec. 17, 1996); Fariello v. Campbell, 860 F.Supp. 54, 67–68 (E.D.N.Y.1994) ; Levine v. County of Westchester, 828 F.Supp. 238, 243 (S.D.N.Y.1993), aff'd mem., 22 F.2d 1090 (2d Cir.1994). 10

See also, e.g., Sanchez–Preston v. Judge Luria, 1996 WL 738140 at *

4; Fariello v. Campbell, 860 F.Supp. at 68; Levine v. County of Westchester, 828 F.Supp. at 243. 11 Accord, e.g., Pollack v. Nash, 58 F.Supp.2d 294, 303 (S.D.N.Y.1999); Jones v. Newman, 98 Civ. 7460,

1999 WL 493429 at *

6 (S.D.N.Y. June 30, 1999); Reisner v. Stoller, 51 F.Supp.2d 430, 442 (S.D.N.Y.1999); Amaker v. Coombe, 96 Civ. 1622, 1998 WL 637177 at *

3 (S.D.N.Y. Sept. 16, 1998); Carr v. Village of New York Mills, New York, No. CivA96CV0042, 1998 WL 187395 at *

2 (N.D.N.Y. April 15, 1998) (Pooler, D.J.); Sanchez–Preston v. Judge Luria, 1996 WL 738140 at *

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Footnotes

1 DA Melinda Katz, https://queensda.org/team/da-katz/ (last visited Nov. 27, 2023). 2 Michael Aloise, BALLOTPEDIA, https://ballotpedia.org/Michael_Aloise (last visited Nov. 27, 2023). 3 While the Court recognizes the issue of venue as it relates to claims against DA Katz and Judge Aloise

arising out of Plaintiff's criminal proceedings in Queens, New York, a transfer of those claims would be futile. See Robinson v. New York State Corr., No. 9:19-CV-1437 (DNH/TWD), 2020 WL 1703669, at *3 (N.D.N.Y. Apr. 8, 2020). 4 Plaintiff should note that although his IFP application has been granted, he will still be required to pay fees

that he may incur in this action, including copying and/or witness fees. 5 If you are proceeding pro se

and are served with this Order and Report-Recommendation by mail, three

additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. 6(a)(1)(C). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 CPL § 180.80 provides in pertinent part that a defendant held in custody for "more than one hundred twenty

hours or, in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred

forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon"

must be released by the local criminal court. "The purpose of CPL § 180.80 is 'to ensure that a defendant being held in custody on the basis of a felony complaint not be incarcerated for an excessive period of time prior to judicial determination that there is reasonable cause to believe that he committed a felony.' " People v. Ijnace, 174 Misc. 2d 850, 854–55, 667 N.Y.S.2d 229, 233 (Sup. Ct. 1997) (quoting People ex rel. Suddith and Willard Cradle v. Sheriff of Ulster County, 93 A.D.2d 954, 463 N.Y.S.2d 276 (3rd Dept. 1983)). 2 Plaintiff selects that he is bringing this complaint against Brown in his "individual capacity" on the form

complaint. See Compl. at 2. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Unless otherwise stated, the following facts are taken from the complaint and assumed, for purposes of this

motion, to be true. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). 2 The relevant state court trial transcripts were submitted by the DA Defendants in their motion to dismiss. See

Trial Tr.; Dismissal Tr., ECF No. 22-4. The Court may take judicial notice of these transcripts as a matter of public record. See Shmueli v. City of N.Y., 424 F.3d 231, 233 (2d Cir. 2005). 3 Because the Court concludes that it lacks jurisdiction over Plaintiff's claims against the State under Rule

12(b)(1), it need not reach the State's alternative ground for dismissal, that Plaintiff's § 1983 and §

1985 claims must be dismissed because the State is not a suable "person" within the meaning of those statutes. State Mem. at 3–4. 4 Plaintiff makes this clarification for the first time in his opposition papers. ECF No. 28 at 14. The Court notes

that because, as discussed, the Eleventh Amendment bars suits against states, see supra at 8–10, when a defendant is sued in his official capacity, the court treats the suit as one against the "entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (quoting Monell v. N.Y.C. Dep't of Soc. Serves, 436 U.S. 658, 690 n.55 (1978)). And, where a "district attorney or an assistant district attorney acts as a prosecutor, she is an agent of the State, and therefore immune from suit in her official capacity." D'Alessandro v. City of N.Y., 713 F. App'x 1, 8 (2d Cir. 2017). Accordingly, any claims Plaintiff may raise against the DA Defendants in their "official capacity" would be precluded by immunity under the Eleventh Amendment. See id. 5 Although Plaintiff asserts that he pleads each of his claims against "all Defendants," even a liberal read of

the complaint makes clear that certain of Plaintiff's claims cannot implicate the DA Defendants' conduct, including counts 1 (unreasonable search and seizure); 2 (false arrest/imprisonment); 11 (personal injury); 12 (property damage) and 13 (negligent hiring, training, supervision, and discipline of officers). Compl. ¶¶ 117–27, 168–81. As the Court has already dismissed Counts 7 and 9, see supra at 7–8, it only considers Counts 3 (malicious prosecution); 4 (deprivation of fair trial); 5 (conspiracy); 6 (failure to intervene); 8 (abuse of process); 10 (negligent misrepresentation); and 14 (negligent infliction of emotional distress) against the DA Defendants. 6 Because the Court finds that the DA Defendants are entitled to absolute immunity on any claims arising from

the withholding of exculpatory evidence, the Court does not reach their alternative argument that Plaintiff fails to state a claim for an alleged Brady violation, see DA Defs. Mem. at 12–15.

7 As noted, the parallel state-law constitutional claims in Counts 4, 5, and 6 are dismissed with prejudice. See

supra at 8. 8 The DA Defendants' reliance on Johnson v. Fargione is unavailing. In that case, the court found that the

plaintiff's claims, which had expired weeks before the issuance of Executive Order 202.8, could not "be said to have been tolled" by that Executive Order, as the time for filing had already passed and the plaintiff had offered no excuse for the delay. 20 Civ. 764, 2021 WL 1406683, at *3 (N.D.N.Y. Feb. 17, 2021), report and recommendation adopted 2021 WL 1404554 (Apr. 14, 2021). Although Johnson is instructive with respect to how claims that may have expired before the issuance of Executive Order 202.8 (i.e., before March 20, 2020) should be treated, it does not address the applicability of the Executive Order to federal claims that, like Plaintiff's, had not yet expired by that date. 9 Executive Order 202.8 tolled applicable limitations periods from March 20, 2020 to November 3, 2020. The

order amounted to a "pause" in the limitations period—that is, during the duration of the toll, the clock to file [did] not run," but "[o]nce the toll end[ed,] the clock resume[d] from where it was when the toll began, and the plaintiff ha[d] the rest of his limitations period to file his complaint," Johnston v. City of Syracuse, No. 20 Civ. 1497, 2021 WL 3930703, at *6 (N.D.N.Y. Sept. 2, 2021). Because, as of March 20, 2020, when the clock was "paused," Plaintiff had 211 days remaining before the expiration of the limitations period on October 17, 2020, the Court calculates 211 days after November 3, 2020, as the end of the relevant limitations period when tolled—which is June 2, 2021. 10 Even assuming, arguendo, that Plaintiff would not have had reason to know of the harm or injury that was

the basis of his Section 1986 claim until the date the indictment was dismissed (October 17, 2017), the claim would still be time-barred, because this would only extend the limitations period to October 17, 2018—nearly three years before the commencement of this action. 11 As noted, the Court dismissed Count 7 for relying on a statute that does not provide a private right of action,

see supra at 7; Count 9 for being duplicative of Count 4, see id. at 8, and all the state constitutional claims Plaintiff asserts analogously to his federal constitutional claims, see id. 12 As discussed supra at 18–19, even if the Court construes Plaintiff's notice of claim as timely based on the

dismissal of Plaintiff's criminal case on October 17, 2017, Plaintiff still failed to commence this action within one year and 90 days, as required by statute. This provides an alternative ground for dismissal. 13 Plaintiff also names the NYPD as a defendant. See Compl. But, the NYPD is a non-suable agency of the

City, and thus, to the extent any of Plaintiff's claims are brought against it, they fail as a matter of law. See Jenkins v. City of N.Y., 478 F.3d 76, 93 n.19 (2d Cir. 2007). Any such claims are, accordingly, DISMISSED with prejudice. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The court must interpret pro se complaints to raise the strongest arguments they suggest. Soto v. Walker,

44 F.3d 169, 173 (2d Cir. 1995) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). 2 "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

Fed. R. Civ. P. 10(c); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) ("the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."). 3 Plaintiff's references to "his attorney" in the Complaint appear to relate to his representation in certain criminal

matters. Plaintiff has indicated to the Court that he is proceeding pro se in this matter. (Dkt. No. 1 at 1.) 4 Section § 1915(g) prohibits a prisoner from proceeding in forma pauperis where, absent a

showing of

"imminent danger of serious physical injury," a prisoner has filed three or more actions that were subsequently dismissed as frivolous, malicious, or failing to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(g). The Court has reviewed Plaintiff's litigation history on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") Service. See http://pacer.uspci.uscourts.gov. It does not appear from that review that Plaintiff had accumulated three strikes for purposes of 28 U.S.C. § 1915(g) as of the date this action was commenced. 5 To determine whether an action is frivolous, a court must look to see whether the complaint "lacks an arguable

basis in either law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). 6 The Complaint does not separate claims against the Defendants based on the two underlying criminal cases

against Plaintiff in the City of Albany and Town of Guilderland. However, as discussed in Section V.D.1.iii. of this Report-Recommendation, Plaintiff's fabrication of evidence claims against Defendants Filli, Hurley, and McCrindle, in their individual capacities, that relate to the criminal charges against Plaintiff in the City of Albany, should be accepted for filing. 7 Plaintiff also alleges that he "filed a claim in the New York State Court of Claims [against the State of New York]

dealing with the same facts involved in this action[,]" but that the case was dismissed on July 25, 2019 "due to failure of establishing proper service." (Dkt. No. 1 at 2.) A court's dismissal for failure to establish proper service is not a final judgment such that res judicata would apply. Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 373 n.3 (2d Cir. 1978) ("a dismissal for failure of service of process, of course, has no res judicata effect."); Troeger v. Ellenville Cent. Sch. Dist., 15-CV-1294, 2016 WL 5107119, at *7 (N.D.N.Y. Sept. 20, 2016) (D'Agostino, J.) ("The dismissal based upon failure to join a necessary party and improper service are not final decisions on the merits for res judicata purposes."). Based on the Court's review of the New York Court of Claims public docket, Plaintiff's case against the State of New York, Claim No. 132064, was indeed dismissed on June 3, 2019 for failure to properly serve the State of New York in accordance with

the service requirements set forth in the New York Court of Claims Act § 11 and 22 N.Y.C.R.R. § 206.5(a).

Gentry v. State of New York, Claim No. 132064 (N.Y. Ct. Cl. June 3, 2019). 8 The Complaint makes other, sporadic legal conclusions. For example, Plaintiff alleges that, "as a result of the

actions of all defendants [he has] suffered mental anguish, extreme emotion distress and cruel and unusual punishment." (Dkt. No. 1 at 7.) Plaintiff later clarifies that he seeks to hold the State of New York liable for his "cruel and unusual punishment." (Id.) However, as explained in Section V.A. above, the State of New York is immune from suit. To the extent that Plaintiff alleges that

Defendants Filli, Hurley, and McCrindle, in their individual capacities, may have caused his "cruel and unusual punishment" or otherwise inflicted emotional distress upon him, his bare legal conclusions are insufficient to withstand the Court's review under 28 U.S.C. § 1915(e) and 28 U.S.C. § 1915A. 9 Significantly, it is no longer the law of this circuit that a "false arrest" claim under § 1983 accrues only once

a plaintiff received a favorable judgment stemming from the allegedly false arrest. See Jones v. City of New York, 13-CV-929, 2016 WL 1322443, at *3 (S.D.N.Y. Mar. 31, 2016) (explaining that the prior rule from Covington v. City of New York, 171 F.3d 117 (2d Cir. 1999) that a false arrest claim may not accrue until a favorable verdict was reached was overruled by the Supreme Court's Wallace decision). 10 Under the prison mailbox rule, a prisoner's complaint is deemed filed when it is handed to prison officials—

presumptively on the date that the complaint was signed. Hardy v. Conway, 162 Fed. App'x 61, 62 (2d Cir. 2006) (collecting cases). 11 Plaintiff also makes the conclusory allegation that he was "deprived of bail." (Dkt. No. 1 at 7.) However, it is

clear from the face of the Complaint that Plaintiff was afforded bail, as he alleges that when the April 9, 2017 incident took place, he was out on bail from prior charges. (Id. at 3.) Only after he was arrested and arraigned on charges stemming from that April 9, 2017 incident does he allege that his bail on the prior charges was revoked, "after [a] bail revocation hearing." (Id. at 5.) 12 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.)

(explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999)— that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)), rev'd on other grounds, 682 F. App'x 30. 13 As discussed in Section V.D.1.iii. above, I recommend that the fabrication of evidence claims against

Defendants Filli, Hurley, and McCrindle, in their individual capacities, that relate to the case against Plaintiff in the City of Albany be accepted for filing because Plaintiff specifically alleged that the City of Albany case was terminated in Plaintiff's favor. (Dkt. No. 1 at 5.) 14 If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional

days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C). End of Document

Footnotes 1 When no objection is made to a report-recommendation, the Court subjects that report-recommendation to

only a clear-error review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a clear-error review, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Id.; see also Batista v. Walker, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) ("I am permitted to adopt those sections of [a magistrate judge's] report to which no specific objection is made, so long as those sections are not facially erroneous.") (internal quotation marks omitted). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff was granted leave to proceed with this action in forma pauperis. Mem.-Decision and Order (Dkt.

No. 7). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Defendants correctly point out that New York City agencies, such as NYC DOC, are organizational

subdivisions of the City of New York lacking independent legal existence and are not themselves subject to suit. See, e.g., Adams v. Galletta, 966 F.Supp. 210, 212 (S.D.N.Y.1997) ("where a plaintiff has named the Department of Corrections as a defendant, he has sued a non-suable entity").

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Footnotes 1 Plaintiff filed both an original and amended motion to proceed in this action IFP. Dkt. Nos. 2, 6. While the two

motions contain slightly different information concerning plaintiff's financial status, only the amended motion contains the required certification from an official at the correctional facility in which plaintiff is confined. Compare Dkt. No. 3 with Dkt. No. 7. Accordingly, plaintiff's original IFP application is denied as incomplete. 2 The total cost for filing a civil action in this court is $400.00, consisting of the civil filing fee of $350.00, see 28

U.S.C. § 1914(a), and an administrative fee of $50.00. Although an inmate granted IFP status is not required to pay the $50.00 administrative fee, he is required to pay, over time, the full amount of the $350.00 filing fee regardless of the outcome of the action. See 28 U.S.C. § 1915(b)(3). 3 Plaintiff is reminded that, although his IFP application has been granted, he will still be required to pay fees

that he incurs in this action, including copying and/or witness fees. 4 The court expresses no opinion concerning whether plaintiff's claims can survive a properly filed motion to

dismiss or motion for summary judgment, or whether he may prevail at trial. 5 If you are proceeding pro se and are served with this report, recommendation, and order by mail, three

additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The facts are presented in the light most favorable to plaintiff. 2 See Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). 3 In fact, Turczyn claims that she lodged five to ten complaints—of which Shanley was aware—with the Utica

Police within the twelve months preceding the murder. (Am.Compl.¶¶ 12, 13.) So many occurrences may amount to "repeated [and] sustained inaction ... in the face of potential acts of violence." Okin, 577 F.3d at 428. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

1 The Court notes that, on January 11, 2019, Plaintiff filed a letter from the City of Syracuse Citizen Review

Board dated December 31, 2018, outlining its findings with respect to this matter. (Dkt. No. 10.) In its letter, the Citizen Review Board upheld Plaintiff's claim for excessive force against "Det. One," recommended a written reprimand against that individual, and absolved "Det. Two," "Sgt. One," and "Lt. One" from wrongdoing regarding the use of excessive force. (Id.) The Court does not liberally construe this letter as any sort of Objection to the Report-Recommendation. 2 When no objection is made to a report-recommendation, the Court subjects that report-recommendation to

only a clear error review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a "clear error" review, "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Id.; see also Batista v. Walker, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) ("I am permitted to adopt those sections of [a magistrate judge's] report to which no specific objection is made, so long as those sections are not facially erroneous.") (internal quotation marks omitted). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff filed an Addendum to his Complaint which is a copy of the handwritten pages appended to the

Complaint. The only change is a correction to the date the incident occurred. 2 Miranda v. Arizona, 384 U.S. 436 (1966). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Defendants refer to the New York City Department of Education as the "BOE," designating the Board of

Education of the City School District of the City of New York. See, e.g., Defs.' Reply Br. 1 n. 1, Doc. 19. 2 Some of the allegations appear in documents attached to the complaint and incorporated by reference, as

well as in Plaintiff's opposition to the motion to dismiss. "[I]n cases where a pro se plaintiff is faced with a motion to dismiss, it is appropriate for the court to consider materials outside of the complaint to the extent they are consistent with the allegations in the complaint." Donhauser v. Goord, 314 F.Supp.2d 119, 121 (N.D.N.Y.2004) (quotation marks omitted) (collecting district court cases), vacated in part on other grounds, 317 F.Supp.2d 160 (N.D.N.Y.2004); see also Gill v. Mooney, 824 F.2d 192, 195 (2d Cir.1987) (considering allegations in pro se plaintiff's opposition to motion to dismiss). 3 The BOE is considered a "public employer" as defined by the New York State Civil Service Law. N.Y. Civ.

Serv. Law § 75–b (1)(a)(iii) (McKinney). 4 Presumably, to teach special education students during the daytime.

5 Although the Complaint specifies the 2010–2011 academic year for this allegation, the Court assumes that

Plaintiff meant to state 2011–2012 in light of her contention that the "critical period" for her retaliation claim started in September 2011. See Compl. ¶¶ 31–32. 6 As discussed infra, Plaintiff attaches several letters to the Complaint, including a disciplinary letter dated

October 28, 2011 written by Assistant Principal DeJesus. To the extent that they are consistent with Plaintiff's allegations, the Court deems such letters incorporated into the Complaint by reference. Donhauser, 314 F.Supp.2d at 121. 7 The meaning of this acronym is not apparent to the Court, as Plaintiff's allegations do not define the term. 8 Other than the limited reference to it in the Special Ed Complaint, the record is silent regarding the content

of this disciplinary letter. 9 While Exhibit 2 to the Complaint indicates that she attended a meeting on January 23, 2012, prior to going

into labor, Plaintiff appears to allege that she went into labor before the meeting (Compl.¶ 41). 10 The letter bears Plaintiff's signature, an apparent acknowledgement of receipt. 11 Section 4.3.2 of the BOE's bylaws, entitled "Appeals re Discontinuance of Probationary Service," provides

that: Any person in the employ of the City School District who appears before the Chancellor, or a committee designated by the Chancellor, concerning the discontinuance of service during the probationary term, or at the expiration thereof, shall have a review of the matter before a committee which shall be designated in accordance with contractual agreements covering employees or by regulations of the Chancellor, as appropriate. After the review, the committee shall forward its advisory recommendation to the community superintendent or to the Chancellor in accordance with contractual agreements. Kahn v. N.Y.C. Dep't of Educ., 18 N.Y.3d 457, 463 (N.Y.2012). Pursuant to section 4.3.3, "the employee is entitled to appear in person at the hearing, accompanied by an advisor; to be confronted by and call witnesses; and to examine exhibits and introduce relevant evidence. The CBA calls for the section 4.3.2 review to be conducted by a tripartite committee of professional educators, with one selected by the teacher, one by BOE and the third by the other two from an agreed-upon list." Id. 12 The Court interprets the "HR Connect blacklist" to be internal to the City of New York Department of Education

based on facts alleged by the Plaintiff. 13 While Plaintiff also cites the Fifth and Seventh Amendments, see Compl. ¶ 1, neither amendment provides

a basis for an additional cause of action. The Court construes Plaintiff's citation to the Seventh Amendment as support for her request for a civil jury trial, U.S. Const. Amend. VII, and the Fifth Amendment has no applicability here, as Defendants are state, not federal, actors. 14 To the extent that the Complaint can be construed to allege First Amendment retaliation for Plaintiff's decision

to file the Special Ed Complaint, the Court likewise dismisses such claim. Plaintiff's Special Ed Complaint expressed concern about the Defendants' response to the September 24, 2011 Emails and complained of "special education fraud" at P.S. 249. Compl. Ex. 6. Yet, because filing a grievance with a union is "not a form or channel of discourse available to non-employee citizens," it is not speech made as a public citizen, and thus falls outside of the umbrella of First Amendment protection. Weintraub v. Bd. Of Educ., 593 F.3d 196, 204 (2d Cir.2010). "[T]he First Amendment invests public employees with certain rights, [but] it does not empower them to 'constitutionalize the employee grievance.' " Garcetti, 547 U.S. at 420 (quoting Connick,

461 U.S. at 154). Thus, Plaintiff's grievance lacks First Amendment protection and cannot form the basis of

a retaliation claim. 15 Claims under the Fourteenth Amendment are not restricted to multi-person classes; an individual, as a "class

of one," can seek Equal Protection under the Fourteenth Amendment. See, e.g., Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008). However, the Supreme Court has held that equal protection "class of one" claims do not apply in the public employer context. Id. at 605–607. Accordingly, Plaintiff cannot seek relief as a "class of one" here. See id. at 602. 16 To the extent that the Complaint can be construed as an attempt to allege violations of the witness tampering

statute, 18 U.S.C. § 1512, the Court also dismisses such claims. Compl. ¶ 11. None of Plaintiff's allegations involve a witness threatened with physical force or death at an "official proceeding"—but most significantly, the witness tampering statute does not provide for a private right of action. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 With respect to Defendants Matos and Hanley, service was accepted on behalf of both Defendants and was

deemed complete for Hanley as of July 26, 2023 (Doc. 29) and Matos as of August 16, 2023. (Doc. 42). Defense counsel did not appear or move on behalf of Matos or Hanley. (Doc. 43; Doc. 53). Accordingly, Matos and Hanley are currently in default and not a part of this motion practice. 2 On February 1, 2023, the Court dismissed Plaintiff's Ninth Claim for Relief for municipal liability against

Dutchess County. (Doc. 6). 3 While Defendants acknowledge in briefing that the Complaint alleges the use of excessive force (Def. Br. at

7), Defendants do not address excessive force or failure to intervene as independent claims for relief. The Complaint states that Plaintiff "has raised multiple violations under the Eighth Amendment of the Constitution that include, Deliberate Indifference to Serious Medical need, Excessive Force By Prison Officials, and Failure to Protect From Prison Officials." (Compl. at p. 54). Indeed, the gravamen of the Complaint is the alleged physical assault on Plaintiff during the C.E.R.T. Raid. Therefore, the Court construes the Third Claim for Relief as alleging claims for excessive force and failure to intervene, as well as deliberate indifference to serious medical needs, under the Eighth Amendment. 4 On a Rule 12(b)(6) motion, "the Court is entitled to consider facts alleged in the complaint and documents

attached to it or incorporated in it by reference, [as well as] documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken ...." Heckman v. Town of Hempstead, 568 F. App'x 41, 43 (2d Cir. 2014); Manley v. Utzinger, No. 10-CV-02210, 2011 WL 2947008, at *1 n.1 (S.D.N.Y. July 21, 2011) (explaining that a court may consider "statements or documents incorporated into the complaint by reference, and documents possessed by or known to the plaintiff and upon which the plaintiff relied in bringing the suit"). The Court may therefore consider the medical records attached to the Complaint. 5 Though Plaintiff identifies Nurses Mukkatt and Gifty as having failed to provide prompt medical care (Compl. ¶

58), Plaintiff does not allege in sufficient detail that Mukkatt or Gifty saw him after the C.E.R.T. Raid, became aware of a serious medical risk, and deliberately disregarded that risk. The Third Claim for Relief against them is dismissed. 6 Given the conclusions reached herein, the Court need not address Defendants' argument that Plaintiff's

deliberate indifference allegations against Sullivan are duplicative of those asserted in Plaintiff's prior litigation. (Def. Br. at 13). 7 These claims proceed against the Defendants in their individual capacities only, since the Eleventh

Amendment bars § 1983 claims against individual Defendants in their official capacities as DOCCS employees. Phillips v. New York, No. 13-CV-00927, 2013 WL 5703629, at *3 (N.D.N.Y. Oct. 17, 2013) (citing

Vincent v. Yelich, 718 F.3d 157, 177 (2d Cir. 2013)); see also Keitt v. New York City, 882 F. Supp. 2d 412,

424 (S.D.N.Y. 2011). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 I note, however, that the report-recommendation would survive even de novo review. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.