IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Aktham Abuhouran,	:	
Plaintiff	:	Civil Action
	:	No. 04-2265
v.	:	
	:	
Dougles Acker, et al.	:	
Defendants	:	

Memorandum and Order

Yohn, J. June_____, 2005

Plaintiff Aktham Abuhouran, an inmate at Federal Correctional Institution Raybrook, New York, has filed a *pro se* Bivens[1] action against Bureau of Prisons ("BOP") employees D. Scott Dodrill, Edward B. Motley, Thomas Mulvey, and Douglas Acker.[2] The complaint raises constitutional claims under the First, Fifth, and Eighth Amendments. Plaintiff, who is Jordanian by birth, alleges that defendants retaliated against him for exercising his First Amendment right to petition the courts; denied him his Fifth Amendment right to due process, including his right to equal protection of the laws; and subjected him to cruel and unusual punishment in violation of

[1]Although plaintiff filed this action pursuant to 42 U.S.C. § 1983, the case will be treated as one brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which created a direct cause of action under the Constitution against federal officials for the violation of constitutional rights. *See Solan v. Reno, et al.*, No. 99-1017, 1999 U.S. Dist. LEXIS 12237 at *1 n.1 (E.D. Pa. August 9, 1999); *Lattany v. Four Unknown U.S. Marshals, et al.*, 845 F. Supp. 262, 265 (E.D. Pa. 1994). An action under § 1983 may not be brought against a federal official. *See Solan*, 1999 U.S. Dist. LEXIS at *1 n.1.

[2]Dodrill is the regional director for the northeast region, Motley is the warden of Federal Detention Center Philadelphia ("FDC Philadelphia"), Mulvey is a unit manager at FDC Philadelphia, and Acker is a correctional counselor at FDC Philadelphia.

the Eighth Amendment.

Pending before me now is defendants' motion to dismiss the complaint, pursuant to Federal Rules of Civil Procedure 12(b)(5) and 12(b)(6), or, in the alternative, for summary judgment. A motion to dismiss is ordinarily converted to a motion for summary judgment when a court considers evidence beyond the complaint. *Anjelino v. New York Times Co.*, 200 F.3d 73, 88 (3d Cir. 2000) (citing Fed. R. Civ. P. 12(c)). However, a court may consider documents "integral to or expressly relied upon in the complaint," as well as matters of public record, without converting a motion to dismiss into a motion for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Having considered only the complaint and those documents upon which it expressly relies, I will treat the motion as one to dismiss pursuant to Rules 12(b)(5) and (12)(b)(6). For the reasons stated herein, defendants' motion will be granted in part and denied in part.

I. Background and Procedural History

The following facts are either undisputed or drawn from plaintiff's version of events.[3] In August of 1997, plaintiff was tried and convicted in the United States District Court for the Eastern District of Pennsylvania for bank fraud, money laundering, conspiracy to commit perjury and to make false statements, conspiracy to commit money laundering, and forfeiture. He was sentenced to 109 months in prison with five years supervised release. The instant action was prompted by events that occurred between September 2002 and August 2003, while plaintiff was

[3]Plaintiff's complaint is a loosely organized litany of events in which plaintiff perceives (rightfully or wrongly) the violation of his constitutional rights. The court has attempted to correlate the most serious of plaintiff's factual allegations with the constitutional claims to which they most logically correspond. Any allegations not addressed herein have been omitted because they cannot, under any interpretation, state an actionable claim.

detained at FDC Philadelphia, awaiting trial on a second indictment for conspiracy to commit bank fraud, wire fraud, obstruction of justice, and perjury. The charges in the second indictment, to which plaintiff eventually pled guilty in 2003, arose out of actions plaintiff took while being prosecuted on the prior indictment. Plaintiff filed this action in November 2004. He sues defendants in their official and personal capacities.[4]

Defendant Acker was the correctional counselor for the unit to which plaintiff was assigned while he was detained at FDC Philadelphia. Plaintiff states that Acker consistently treated plaintiff unfavorably, in ways that plaintiff perceived to be harassing and related to plaintiff's Middle-Eastern origin and his filing of grievances. Plaintiff believes that Acker held a personal grudge against him. Acker mocked plaintiff's name, accent, and religion[5]; referred to him as "a little terrorist"; searched his cell for no apparent reason; confiscated his medicine[6]; and "set him up" to be harmed by other inmates, first by telling another inmate that he was "hot,"[7] and then by transferring him to a cell occupied by an inmate with whom Acker knew he had a

[4]Insofar as plaintiff seeks money damages from defendants acting in their official capacities, his claims must be treated as claims against the government itself and are barred by the doctrine of sovereign immunity. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining the difference between personal-capacity and official-capacity suits under § 1983).

[5]Plaintiff is a Catholic. He alleges that Acker intentionally persisted in the wrongful assumption that he is a Muslim.

[6]Plaintiff admits that his medicine was returned, ostensibly after defendant Acker checked with the pharmacist to make sure that plaintiff hadn't been giving his medicine to other inmates. Plaintiff does not allege that he was physically harmed as a result of the temporary confiscation of his medicine.

[7]Plaintiff explains in his complaint that "hot" is prison slang for being a government informant or a "snitch."

conflict.[8] Acker repeatedly ordered plaintiff to clean the library, even though there were other inmates paid to do the job, and even though Acker denied plaintiff's requests to be assigned to work in the library on a paid basis.

One day, plaintiff challenged Acker about being asked to clean the library, leading Acker to file an incident report in which he charged plaintiff with refusing an order. As a result of the incident report, plaintiff was transferred to another housing unit and placed on commissary restriction. Plaintiff filed a grievance, maintaining that the incident report itself and the resulting transfer and suspension of privileges were "bogus" and motivated by Acker's discriminatory animus against him. In addition to the incident in the library, plaintiff recounts an incident in which Acker embarrassed him by opening the cells of other inmates at lunchtime before opening plaintiff's cell, and then taunted him in front of other inmates for complaining that Acker had been harassing him.

In all, plaintiff filed three grievances while he was detained at FDC Philadelphia, complaining of harassment and discriminatory treatment at the hands of defendant Acker. Each of these grievances was investigated pursuant to established administrative procedures, and plaintiff's allegations in each instance were found to be without merit. Plaintiff unsucessfully appealed the unfavorable decisions.

Although the bulk of plaintiff's allegations are, as his grievances were, directed against Acker, plaintiff's complaint implicates defendants Mulvey, Motley, and Dodrill as well. Defendant Mulvey, upon plaintiff's arrival at FDC Philadelphia, inquired about plaintiff's

[8]Plaintiff does not allege that he actually suffered any physical harm at the hands of other inmates as a result of Acker's alleged actions.

country of origin, to which plaintiff replied that he is from Jordan. When asked by plaintiff if he "had a problem with that," Mulvey informed plaintiff that he could, but would not, hold plaintiff in administrative segregation. On one occasion, Mulvey instructed plaintiff, in a way that plaintiff perceived to be threatening, to speak well of FDC Philadelphia to a team of regional staff who were evaluating the facility. In addition, Mulvey, with defendant Acker, searched plaintiff's cell and "stormed" the law library while plaintiff was working there, disturbing plaintiff's papers and leaving them in disarray. Defendants Motley and Dodrill took no action to intervene in Acker and Mulvey's conduct. Dodrill refused to classify as "sensitive" plaintiff's grievance complaining of Acker's harassment, even though plaintiff feared retaliation.[9]

Defendants filed the instant motion on March 1, 2005. They argue that plaintiff's complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5), because plaintiff failed to properly serve the U.S. Attorney for the Eastern District of Pennsylvania and the Attorney General of the United States, as required by Federal Rules of Civil Procedure 4(i)(1)(A) and (B). They also argue that the complaint should be dismissed pursuant to Rule 12(b)(6), because plaintiff fails to state a claim upon which relief can be granted. In the alternative to dismissal on 12(b)(6) grounds, they argue that they are entitled to judgment as a matter of law on all plaintiff's constitutional claims, and that they are entitled to qualified immunity.

II. Discussion

A. Motion to Dismiss Pursuant to 12(b)(5)

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[9]If a grievance is classified as "sensitive," it may be filed directly with the regional office, bypassing the grievance process at the institutional level.

Defendants observe that, although each individual defendant executed and returned a waiver of service, there is no record of service ever having been effected on either the U.S. Attorney or the Attorney General. Therefore, defendants argue, the complaint should be dismissed pursuant to Rule 12(b)(5) for failure to make proper service of process. In support of their argument, defendants cite Federal Rule of Civil Procedure 4(i)(1), which governs service upon the United States, its agencies, corporations, officers, or employees. The rule provides, in relevant part, that "[s]ervice of process shall be effected by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought…and by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States." Fed. R. Civ. Pro. 4(i)(1). Defendants also cite *Micklus v. Carlson*, 632 F.2d 227, 240 (3d Cir. 1980), which held that the Federal Rules of Civil Procedure require a plaintiff to serve both the individual defendant and the United States in order to effect proper service upon a federal employee sued in his personal capacity.

Defendants' reliance on Rule 4(i) and *Micklus* is misplaced, however, given that plaintiff was authorized to proceed *in forma pauperis* in this case on September 3, 2004. The Federal Rule of Civil Procedure governing service of process in cases brought by plaintiffs *in forma pauperis* is Rule 4(c)(2), which provides that, in cases in which the plaintiff is authorized to proceed *in forma pauperis* pursuant to 28 U.S.C. §1915, service is to "be effected by a United States marshal, deputy United States marshal, or other person or officer appointed by the court for the purpose." Fed. R. Civ. Pro. 4(c)(2); *see also* 28 U.S.C. § 1915(c) (providing that "officers of the court shall issue and serve all process, and perform all duties in [*in forma pauperis*] cases").

Once *in forma pauperis* status is granted, it becomes the district court's responsibility to

serve process upon all defendants. *Young v. Quinlan*, 960 F.2d 351, 359 (3d Cir. 1991). Because the court ordered the U.S. Marshal to make service upon defendants, and because it was the Marshal's responsibility in this case, and not plaintiff's, to effect proper service upon the government, it would be unfair to penalize plaintiff for failing to effect service. *See id.* Accordingly, defendants' motion to dismiss on the ground that plaintiff failed to properly serve the United States is denied.[10]

B. Motion to Dismiss Pursuant to 12(b)(6)

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corporation*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Resource Systems, Inc. v. Lycoming County, Pennsylvania, acting through the Lycoming Company Solid Waste Department*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). "A *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state

[10]The court notes that the U.S. Attorney's Office has entered an appearance in the action. If defendants' counsel has further objection to the service of process, the court will direct the U.S. Marshal's Office to specifically serve the U.S. Attorney for the Eastern District of Pennsylvania and the Attorney General of the United States.

a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) (quoting from *Haines v. Kerner*, 404 U.S. 519 (1972)).

When a defendant in a Bivens action raises the defense of qualified immunity in the context of a motion to dismiss or a motion for summary judgment, the court must apply the two-step analytic framework articulated by the United States Supreme Court in *Siegert v. Gilley*, 500 U.S. 226 (1991). *See Lattany v. Four Unknown U.S. Marshals, et al.*, 845 F. Supp. 262, 265 (E.D. Pa. 1994). First, the court must determine whether the plaintiff has asserted the violation of a constitutional right. *Siegert*, 500 U.S. at 231. Then, the court must determine whether the right alleged to have been violated was clearly established at the time of the alleged violation. *Id.*

1. Fifth Amendment Claims

(a) Equal Protection

Plaintiff has alleged that defendants Acker and Mulvey violated his right to equal protection by harassing him and discriminating against him because he is an Arab-American from Jordan. Plaintiff further alleges that defendants Mulvey, Motley, and Dodrill "supervised and condoned" Acker's illegal discriminatory conduct. Although lawful imprisonment entails the necessary withdrawal or limitation of many rights and privileges, *see Pell v. Procunier*, 417 U.S. 817, 822 (1974), inmates have a constitutional right to be free from discrimination based on race and other "suspect classifications," such as alienage or country of origin. *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004); *Bentley v. Beck*, 625 F.2d 70, 70-71 (5th Cir. 1980). Inmates in federal custody enjoy this right through the equal protection component of the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). To

state an equal protection claim against a government actor, a plaintiff must establish that the official is guilty of purposeful discrimination on the basis of the plaintiff's membership in a suspect class. *Brown v. Borough of Mahaffey*, 35 F.3d 846, 850 (3d Cir. 1994).

It is well established, however, that racially derogatory language, verbal harassment, or threats standing alone do not state a constitutional claim. *Dewalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 1999); *Williams v. Bramer*, 180 F.3d 699, 706 (5th Cir. 1999); *Maclean v. Secor*, 876 F. Supp. 695, 698 (E.D. Pa. 1995). To support a cause of action under the Equal Protection Clause, racial epithets must be coupled with harassment or other specific conduct. *Williams*, 180 F.3d at 706; *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989).

Plaintiff's complaint[11] couples specific allegations of verbal mockery and ethnically derogatory epithets with specific allegations of harassing conduct and unfavorable treatment. Taking these allegations to be true, I conclude that plaintiff has put forward facts sufficient to support an inference by a reasonable fact-finder that defendant Acker's treatment of him was motivated by improper ethnic animus. *See Williams*, 180 F.3d at 701 (holding that use of a racial epithet is "compelling evidence" of racial animus); *Lattany*, 845 F. Supp. at 268 (finding that the use of epithets is evidence that racial animus motivated adverse actions).

Plaintiff has failed, however, to plead any facts as to specific conduct by defendant Mulvey from which improper discriminatory animus on Mulvey's part could reasonably be inferred. It is not inherently harassing or discriminatory merely to inquire, as Mulvey allegedly inquired of plaintiff, about someone's country of origin. Mulvey, unlike Acker, is not accused of

[11]Plaintiff elaborated, in his response to defendants' motion, on some of the charges brought in his initial complaint. Because plaintiff is proceeding *pro se*, I treat the factual and legal allegations raised in his response as if they had been raised in an amended complaint.

using racial epithets or engaging in mocking verbal behavior. Standing alone as it does, Mulvey's query is not sufficient to support an inference by a reasonable fact-finder that Mulvey's treatment of plaintiff was motivated by improper animus.

Moreover, even if plaintiff's factual allegations could support the inference that Mulvey acted with discriminatory intent when he threatened to hold plaintiff in segregation and directed him to say only good things about the facility, threats alone are not adequate to establish an Equal Protection violation. *See Collins v. Cundy* 603 F.3d 825, 826 (10th Cir. 1979) (allegation that sheriff threatened to hang prisoner did not state claim for constitutional violation); *Maclean*, 876 F. Supp. at 698 (threat by BOP guard to "see to it" that "pieces of s— " like plaintiff would be "taken care of" was not adequate to make out constitutional claim). Plaintiff's equal protection claim must be dismissed as to Mulvey insofar as it alleges Mulvey's direct participation in constitutional wrongdoing. Plaintiff did not meet his burden of putting forward facts sufficient to state a claim that Mulvey treated him differently from other inmates based on plaintiff's Middle-Eastern origin.

In addition to alleging direct wrongdoing by Mulvey, plaintiff seeks to hold Mulvey liable in his capacity as Acker's supervisor. He also seeks to hold Motley and Dodrill liable in their supervisory capacities, on the theory that liability for constitutional violations under 42 U.S.C. § 1983 is proper where a supervisory official knew of and acquiesced in the illegal conduct of employees. The Supreme Court has not decided the question of vicarious liability in *Bivens* actions, and the Third Circuit has declined to rule on the issue. *See Young*, 960 F.2d at 358 n.14. The Supreme Court has held, however, that vicarious liability is unavailable in § 1983 actions. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163,

166 (1993) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)). This rule has been extended to *Bivens* actions in a slight majority of circuits. *See Dean v. Gladney*, 621 F.2d 1331, 1334 (5th Cir.1980) (collecting cases).

A supervisory official may be held liable, however, if he or she had actual knowledge of and acquiesced in the alleged violation. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1999). The mere fact that a defendant may hold a supervisory position is insufficient to sustain liability. *Wilson v. Horn*, 971 F. Supp. 943, 947 (E.D. Pa. 1997). Where the only role of supervisory prison officials in the alleged misconduct of their subordinates is the denial of a plaintiff's administrative grievances and a concomitant failure to act to remedy the alleged misconduct, *Bivens* liability is unjustified. *Shehee v. Luttrell*, 199 F.3d 295 (6th Cir. 1999).

Despite defendants' arguments to the contrary, plaintiff's allegations that Mulvey, Motley, and Dodrill had knowledge of and acquiesced in plaintiff's alleged ethnic harassment by Acker are sufficient to sustain a complaint at this stage in the proceedings. Plaintiff asserts that Mulvey, Motley, and Dodrill knew of and condoned Acker's allegedly improper conduct. Whether plaintiff will be able to adduce sufficient evidence to counter a motion for summary judgment or to persuade a jury of this is, of course, a question for another day. For now, the allegations of this *pro se* plaintiff are adequate to survive a motion to dismiss.

Defendants also argue that plaintiff's equal protection claim must fail, because he does not identify any specific individuals who were allegedly treated differently than he was. While defendants are correct in their observation that plaintiff has failed to identify, by name, any inmates who were treated differently than he was, plaintiff does allege that Acker singled him out as the only Middle Easterner in the unit and extended privileges to other inmates that plaintiff

was denied. Plaintiff's allegations, though understandably not pled with clear knowledge of the elements of an equal protection claim, are sufficient in light of plaintiff's *pro se* status to defeat a motion to dismiss. Furthermore, defendants are not entitled to qualified immunity on plaintiff's equal protection claim, because plaintiff has alleged facts sufficient to state a viable constitutional claim, and because the right to be free from discrimination based on one's country of origin is a clearly established right. *See Siegert*, 500 U.S. at 231.

(b) Due Process

Plaintiff alleges that the incident report Acker filed relating to plaintiff's refusal to clean the library was "bogus" and, therefore, constituted a denial of his right to due process. Moreover, he alleges that the report was not fairly adjudicated by BOP staff. As long as an inmate charged with misconduct has been given the procedural due process protections required by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), an allegation that he was falsely accused by a prison official does not state a claim for violation of his constitutional rights. *See Maclean*, 876 F. Supp. at 699; *Wilson v. Maben*, 676 F. Supp. 581, 584 (M.D. Pa. 1987). *Wolff* requires written notice of the charges at least twenty-four hours before a disciplinary hearing; a fair hearing; a limited opportunity to call witnesses and present documentary evidence; and a written statement by the fact finder of the reasons for any decision on the charges. *Wolff*, 418 U.S. at 563-71.

It is unclear from plaintiff's complaint whether he received the procedural due process to which he was entitled under *Wolff* with respect to the library incident report. Defendants' motion to dismiss plaintiff's due process claims relating to the adjudication of the incident report must therefore be denied. If defendants can prove that plaintiff's procedural due process rights were honored in the adjudication of the incident report filed against him while he was at FDC

Philadelphia, they may well be entitled to summary judgment on plaintiff's claim. However, because plaintiff alleges that Mulvey, Motley, and Dodrill knew of and acquiesced in an unfair adjudication of the incident report, plaintiff's due process claim survives.

2. First Amendment Retaliation Claims

Plaintiff appears to allege that Acker and Mulvey retaliated against him because he provided legal assistance to other inmates. He also appears to allege that they retaliated against him for filing grievances within the BOP system. To state an actionable claim for retaliation, a prisoner-plaintiff must prove that (1) the conduct which led to the alleged retaliation was constitutionally protected; (2) he suffered some adverse action that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) the constitutionally protected conduct was a substantial or motivating factor in the decision to take adverse action. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001).

Plaintiff's retaliation claims are rooted in the First Amendment, which guarantees the right to access to the courts and the right to petition the government for redress of grievances. *See Milhouse v. Carlson*, 652 F.2d 371, 373-374 (3d Cir. 1981). The right of prisoners to access to the courts entails access to adequate law libraries or adequate assistance from persons trained in the law. *Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000). This right does not translate, however, into a freestanding constitutional right on the part of prisoners to render legal assistance to other prisoners. *Carter v. Dragovitch*, 292 F.3d 152, 153-154 (3d Cir. 2002) (citing *Shaw v. Murphy*, 532 U.S. 223 (2001)). Insofar as plaintiff's pleading can be construed to allege that he was retaliated against for helping other prisoners prepare their legal filings, it does not allege

retaliation for the exercise of a constitutionally protected right.[12]

Insofar as plaintiff's pleading can be construed to allege that he was retaliated against for exercising his own right to petition the government for the redress of grievances, he does establish that he engaged in constitutionally protected conduct. His complaint also satisfies the second element of a prima facie case for retaliation, because the conduct he alleges, including the filing of an unwarranted misconduct report and the assignment to administrative segregation, has been held to be sufficiently serious to deter a person of ordinary firmness from exercising his or her constitutional rights. *See Smith v. Mensinger*, 293 F.3d 641 (3d Cir. 2002) (false misconduct reports); *Allah*, 229 F.3d at 220 (continued detention in administrative segregation).

Plaintiff altogether fails to sufficiently allege the element of causation, however. All of the specific facts he has alleged to show improper motivation are probative of improper motivation based on plaintiff's Middle-Eastern origin. None of the facts he puts forward to prove wrongful motive suggest that plaintiff's assertion of his First Amendment rights was a substantial factor in any adverse action sufficiently serious to establish a constitutional violation.[13] Also

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[12]Plaintiff also alleges what he characterizes as retaliatory animus arising from a "vindictive letter" from the U.S. Attorney's office that is purportedly in his permanent file. To be cognizable, a claim for retaliation must allege retaliatory conduct *prompted by the claimant's exercise of a constitutional right*. *Rauser*, 241 F.3d at 333. Insofar as plaintiff alleges that he was treated adversely based on the contents of a letter in his file, he does not state an actionable claim for retaliation.

[13]The only instances in which plaintiff actually links adverse action to his exercise of his First Amendment rights are when he accuses Acker of having mocked him for filing grievances and of having asked him to clean the library in order to distract him from his legal work. While plaintiff alleges a pattern of harassing conduct on Acker's part, he connects only *de minimis* incidents to the exercise of his First Amendment rights. Plaintiff alleges throughout his complaint that the substantial motivation for Acker's campaign of harassing conduct was Acker's bias against plaintiff's national origin. In order to be cognizable as retaliation, the adverse conduct alleged must not only be causally related to the exercise of a protected right, it must be

lacking is any chronology that would establish a temporal link, which would give rise to an inference of causation, between plaintiff's exercise of his First Amendment rights and the incidents of non-*de minimis* adverse conduct he alleges. *See Dewalt*, 224 F.3d at 618 (retaliation may be inferred from chronology of events). Having failed to plead facts sufficient to state a prima facie case for retaliation, plaintiff's claims of retaliation cannot survive defendants' motion to dismiss.

3. Eighth Amendment Claims

Plaintiff accuses defendants of violating his Eighth Amendment rights by intentionally engaging in conduct that endangered his health and security. He alleges that Dodrill intentionally exposed him to the risk of physical harm at the hands of BOP staff by refusing to classify his grievance against Acker as "sensitive." He alleges that Acker endangered his security by telling another prisoner that he was "hot" and by housing him with an inmate with whom he clashed. He alleges that Acker jeopardized his health by temporarily confiscating his medicine to verify it with the prison pharmacy. Furthermore, he claims that the humiliation to which he was subjected by defendants Acker and Mulvey, occasioned by repeated "shakedowns" and other indignities, amounted to cruel and unusual punishment.

While the Constitution does not mandate comfortable prisons, neither does it permit inhumane ones. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). The treatment a prisoner receives and the conditions of his or her confinement are subject to scrutiny under the Eighth Amendment, which prohibits "cruel and unusual punishments." *Id.* (citing *Helling v. McKinney*, 509 U.S. 25 (1993)). Not only does the

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more than *de minimis*. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 397 (6th Cir. 1999).

Eighth Amendment place constraints on the behavior of prison officials, it also imposes on them the duty to provide humane conditions of confinement, including adequate food, clothing, shelter, and medical care, and the duty to take reasonable measures to guarantee prisoner safety. *Id.* (citing *Hudson v. Palmer*, 468 U.S. 517 (1984)). A two-part test, consisting of an objective component and a subjective component, governs Eighth Amendment claims brought by prisoners. *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004). First, a prisoner must prove that the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Id.* Then, the prisoner must prove that the defendant prison officials acted with deliberate indifference. *Id.*

Plaintiff in this case has not alleged any facts sufficient to satisfy the objective component of the two-part test. Not only does plaintiff *not* allege that he was actually physically harmed as a result of any of defendants' actions, he does not offer facts sufficient to support an inference that the risk of harm to which any defendant exposed him was serious or pervasive. *See Young*, 960 F.2d at 361 (requiring a prisoner to show the existence of a "pervasive" risk of harm); *see also Babcock v. White*, 102 F.3d 267, 270 (7th Cir. 1996) (holding that a prisoner may not maintain a *Bivens* action for damages based on prison officials' failure to protect the prisoner from other prisoners when the plaintiff prisoner was never actually assaulted and is no longer at risk). Plaintiff's allegations, which are essentially allegations that he was subjected to emotional and psychological stress, simply do not rise to the level of seriousness required to state an Eighth Amendment claim. *See Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) (stating that "only 'unnecessary and wanton infliction of pain' or 'deliberate indifference to the serious medical needs' of prisoners are sufficiently egregious to rise to the level of a constitutional violation");

see also Babcock, 102 F.3d at 272 (concluding that personal humiliation and psychological distress do not constitute deprivation of 'the minimal civilized measures of life's necessities'). Dismissal of plaintiff's Eighth Amendment claims is therefore required as to all defendants.

For the reasons stated above, defendants' motion to dismiss the complaint is granted in part and denied in part. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Aktham Abuhouran,	:	
Plaintiff	:	Civil Action
	:	No. 04-2265
v.	:	
	:	
Dougles Acker, et al.	:	
Defendants	:	
	:	

Order

AND NOW, this _____ day of June, 2005, it is hereby ORDERED that

(1) defendants' motion to dismiss the complaint for failure to serve process is DENIED;

(2) defendants' motion to dismiss plaintiff's Fifth Amendment equal protection claims is DENIED;

(3) defendants' motion to dismiss plaintiff's Fifth Amendment due process claims is DENIED;

(4) defendants' motion to dismiss plaintiff's First Amendment retaliation claims is GRANTED, and plaintiff's retaliation claims are DISMISSED with prejudice;

(5) defendants' motion to dismiss plaintiff's Eighth Amendment cruel and unusual punishment claims is GRANTED, and plaintiff's Eighth Amendment claims are DISMISSED with prejudice;

(6) defendants' motion to dismiss plaintiff's claims for money damages against defendants in their official capacities is GRANTED.

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William H. Yohn, Jr., Judge