MHA SUPREME COURT CASE NO. AP-2025-001

DISTRICT COURT CASE NOS. CV-2024-0357

IN THE SUPREME COURT OF THE
MANDAN, HIDATSA & ARIKARA NATION

Terrance Fredericks & Carol Goodbear,

Plaintiffs-Appellants,

v.

Mark N. Fox, as Three Affiliated Tribes' Tribal Chairman
Corey Spotted Bear, as Three Affiliated Tribes' Vice-Chairman
Fred Fox, as Three Affiliated Tribes' Executive Secretary,
Mervin Packineau, as Three Affiliated Tribes' Treasurer,
Robert White, as Three Affiliated Tribe' Councilman
Sherry Turner-Lone Fight, as Three Affiliated Tribes Councilwoman
Monica Mayer, as Three Affiliated Tribes' Councilwoman, and the
Defendants-Appellees.

ON APPEAL FROM THE MHA NATION DISTRICT COURT FOR THE FORT
BERTHOLD RESERVATION, NEW TOWN, NORTH DAKOTA

PLAINTIFFS/APPELLANTS' RESPONSE TO DEFENDANT/APPELLEES' MOTION TO STRIKE

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Appellants Terrance Fredericks and Carol Goodbear respectfully submit this Response to Appellees' Motion to Strike Appellants' May 23, 2025, letter regarding Appellees' misstatements and request for judicial notice. For the reasons set forth below, the motion should be denied.

I. INTRODUCTION

Appellees' motion to strike rests entirely on a rigid application of MHA Appellate Rule 1-5-9, ignoring the Supreme Court's inherent authority to permit supplemental filings where necessary to clarify the record or respond to misrepresentations. Appellants' May 23, 2025, letter was submitted to correct a demonstrable misstatement of law and fact by Appellees and to request judicial notice of an official tribal resolution. The letter serves the interests of justice and judicial efficiency and striking it would unduly prejudice Appellants.

II. ARGUMENT

A. The Court Has Discretion to Accept Supplemental Filings.

Although Rule 1-5-9 states that no further response shall be allowed without leave of court, courts routinely exercise inherent authority to allow supplemental filings to clarify the record or address new arguments. Courts routinely permit supplemental submissions when they serve to clarify important legal issues or address matters not previously presented due to changed circumstances. For example, in *Hill v. Rayboy-Brauestein*, the district court reaffirmed that "there can be no doubt that district courts have authority to permit parties to file supplemental summary judgment motions," especially when new legal standards or overlooked issues justify additional briefing. *Hill v. Rayboy-Brauestein,* 2008 WL 231439, at *3 (S.D.N.Y. Jan. 24, 2008). There, the court allowed supplemental evidence following an intervening change in the law, noting that

rejecting the filing would have "render[ed] the granting of Defendants' request ... little more than an empty gesture." Id. at *3–4.

Similarly, in *Jackson v. Goord*, the court denied a motion to strike a supplemental filing even when the moving party had previously failed to present relevant information, because the supplemental filing clarified material issues and promoted judicial efficiency. *Jackson v. Goord*, 664 F. Supp. 2d at 313–14. The court explained that such motions must be evaluated considering the interest in "finality and conservation of scarce judicial resources," but that discretion remained to allow a submission when justice so required. Id. Furthermore, the resolution taking $90,000,000 out of the People's Fund discussed in Plaintiff/Appellants May 23, 2025 letter is new evidence supporting Plaintiff/Appellants arguments and the Court should take judicial notice of it in the interest of justice.

These authorities demonstrate that even when procedural rules are silent or appear restrictive, courts maintain discretion to accept supplemental filings when necessary to ensure a full and accurate adjudication of the issues. The MHA Supreme Court similarly retains discretion to allow supplemental letters or briefing in exceptional circumstances. Here, Appellants acted in good faith to respond to Appellees' erroneous claim of waiver concerning the Section 17 Corporate Charter, a pivotal legal issue.

B. The May 23 Letter Was Necessary to Correct Appellees' Misstatement.

Appellees argued that Appellants had waived all arguments regarding the Section 17 Corporate Charter. This assertion is demonstrably incorrect. Appellants cited the Charter in both the Amended Complaint and the appellate brief. The May 23 letter directed the Court to these

citations and explained their relevance. Appellants should not be penalized for responsibly clarifying the record.

C. The Request for Judicial Notice Is Proper and Efficient.

The letter also requested judicial notice of Tribal Resolution No. 25-130. As a matter of public record, the resolution is appropriate for judicial notice, and its relevance to the governance structure of the People's Fund justifies its submission at this stage. Taking notice now promotes judicial economy by avoiding remand or reconsideration based on an incomplete record.

D. No Prejudice Results from the Letter.

Appellees do not claim that they were prejudiced by the filing of the letter. The letter is brief, limited in scope, and directly responsive to arguments made in Appellees' response brief. There is no risk of undue delay or surprise, and Appellees are free to request leave to respond if they believe it necessary.

III. CONCLUSION

Appellants respectfully request that the Court deny Appellees' Motion to Strike and accept the May 23, 2025, letter as part of the appellate record. The letter corrects material misstatements and serves the interest of a full and fair resolution of the issues presented.

RESPECTFULLY SUBMITTED on this 3rd day of June, 2025.

Steven A. Kelly

Tribal Advocate for Plaintiffs/Appellants

2008 WL 231439
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Lena HILL, Plaintiff,
v.
Carole RAYBOY-BRAUESTEIN, Dr. David Hart, Carole Nelson, Parmanand Persaud, Margaret Refen, Bellevue Hospital and Health Corporation, City of New York and Health & Hospital Corporation, Defendants.

No. 02 Civ. 3770(RJS).
|
Jan. 24, 2008.

Attorneys and Law Firms

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memorandum and order

RICHARD J. SULLIVAN, District Judge.

*1 Plaintiff Lena Hill filed this action alleging discrimination by various defendants, including her employer, Bellevue Hospital & Health Corporation, as well as the City of New York Health & Hospital Corporation, and her co-workers and supervisors Carol Rayboy-Brauestein ("Raboy-Braunstein")[1], Dr. David Hart, Carole Nelson, Parmanand Persaud, and Margaret Refen. The Honorable Kenneth M. Karas, District Judge, then presiding, granted summary judgment to the individual defendants on all counts and to the institutional defendants on all but one count. *See Hill v. Rayboy-Brauestein,* 467 F.Supp.2d 336 (S.D.N.Y.2006). The remaining institutional defendants ("Defendants") thereafter filed a supplemental motion for summary judgment on the remaining count. On September 4, 2007, the case was reassigned to the undersigned. For the reasons herein, the supplemental motion for summary judgment is GRANTED.

I. Background

A. Facts

The background of this litigation is extensively detailed in Judge Karas' opinion, *see Hill v. Rayboy-Brauestein,* 467 F.Supp.2d at 345-48, and the parties' familiarity with the facts is presumed. Nevertheless, the facts relevant to the supplemental motion for summary judgment are provided herein. Plaintiff, an African-American woman, has been an employee of New York City for more than 19 years. On April 17, 2000, Plaintiff was transferred from Gouvenour Hospital to Defendant Bellevue Hospital & Health Corporation ("Bellevue"), as her division at Gouvenour Hospital closed. A few years prior to her transfer, Plaintiff filed a discrimination action under Title VTI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against the New York City Health and Hospital Corporation stemming from her employment at Gouvenour Hospital. *See Hill v. N.Y. City Health & Hosp. Corp.*, No. 96 Civ. 9601 (S.D.N.Y., filed Dec. 20, 1996). That action was settled in April 2000. Plaintiff began working at Bellevue on May 13, 2000, and she was assigned to the Pediatric Laboratory in the Pathology Department. Plaintiff alleges that upon her transfer to Bellevue, she was questioned about the settlement in her previous case, and that, despite her preference for an assignment to the General Hematology Laboratory, she was instead assigned to the Pediatric Laboratory. Plaintiff alleges that this placement in the Pediatric Laboratory was unlawful retaliation for her protected Title VTI activity.

B. Procedural History

On May 16, 2002, Plaintiff brought several causes of action, including (1) purposeful racial discrimination, in violation of Title VTI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; (2) racial discrimination, in violation of 42 U.S.C. § 1981; (3) retaliation against

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Plaintiff for filing a discrimination claim, in violation of Title VII; (4) emotional distress as a result of discrimination under state law; and (5) breach of contract under state law. Plaintiff further mentioned, but did not specifically plead, violations of New York Executive Law sections 296 and 297. At the conclusion of discovery, Defendants moved for summary judgment. On November 29, 2006, Judge Karas granted summary judgment with respect to all but one count, and dismissed the action against the individual defendants. *See Hill,* 467 F.Supp.2d at 371. With respect to the one remaining claim, Judge Karas determined that Plaintiff had produced evidence, unrebutted by Defendants, that her job placement in the Pediatric Laboratory rather than in the General Hematology Laboratory may have been in retaliation for her past protected activity, in violation of Title VII. Accordingly, he denied summary judgment on that sole count. *See id.* at 367-68.

*2 At a status conference on January 19, 2007, the remaining defendants sought and received permission to make a supplemental motion for summary judgment on the ground that an intervening change in the law had deprived them of the opportunity to present evidence with regard to the remaining retaliation claim.

II. Discussion

A. Permission to Supplement Motion

As an initial matter, Plaintiff contends that Judge Karas' decision to permit a supplemental motion for summary judgment was not so broad as to allow Defendants to submit additional evidence relating to the existence of a legitimate, non-retaliatory reason for Plaintiff's placement. (Tr. 32:14-16; 33:5-12.) Specifically, Plaintiff asserts that Defendants' submission of a declaration from Parmanand Persaud ("Persaud Declaration") has improperly "given defendants a second bite at the apple." (*See* Pl.'s Decl. at ¶ 11.) The Court is not persuaded by Plaintiffs argument, and reaffirms Judge Karas's decision to allow Defendants to supplement their motion with the Persaud Declaration.

At the time when the motion for summary judgment was fully submitted, the law was clear that Plaintiff's placement in the Pediatric Laboratory instead of the General Hematology Laboratory was not an adverse action under Title VII for both her discrimination and retaliation causes of action. *See Morris v. Lindau,* 196 F.3d 102, 113 (2d Cir.1999). Thus, because Plaintiff could not establish in her prima facie case that she was subjected to this particular adverse employment action, the burden never shifted to defendants. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973) (describing burden-shifting analysis). Accordingly, defendants did not provide the Court with evidence of a legitimate business reason for this decision.

While the motion was pending, the Supreme Court made clear in *Burlington Northern & Santa Fe Railroad Company v. White,* 126 S.Ct. 2405 (2006), that events that do not constitute adverse employment actions for an alleged intentional discrimination claim may still be considered in the context of a retaliation claim. The Supreme Court held that "the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 2412-13. Judge Karas considered Plaintiffs placement in the Pediatric Laboratory under the new *Burlington* standard, and determined that, for the purpose of establishing a prima facie case of retaliation, Plaintiff had met her burden. Since Defendants had not provided the Court with any evidence to rebut this assertion, Judge Karas denied summary judgment with respect to this lone count. *See Hill,* 467 F.Supp.2d at 367-68.

Nevertheless, because Plaintiff was able to establish a prima facie case on this particular count solely as a result of the change in the law, *see, e.g., Kessler v. Westchester County Dep't of Soc. Servs.,* 461 F.3d 199, 209 (2d Cir.2006) (holding that employment action that was not adverse action under pre-*Burlington* standard was adverse action under *Burlington*), Judge Karas subsequently granted Defendants' request to file a supplemental summary judgment motion to establish a legitimate non-retaliatory reason for Plaintiff's job assignment as-they presumably would have done if they could have anticipated the change in the law.

*3 There can be no doubt that district courts have authority to permit parties to file supplemental summary judgment motions, particularly when an intervening change in the law has altered the positions of the parties. *See, e.g., Mendoza v. Goord,* No. 00 Civ. 0146(GEL), 2002 WL 31654855, at *1 (S.D.N.Y. Nov. 21, 2002); *Heath v. Saddlemire,* No. 9:96-CV-1998 (FJS/RFT), 2002 WL 31242204, at *1, *6 (N.D.N.Y. Oct. 7, 2002); *see also Johnson v. State of Conn. Dep't of Corr.,* 428 F.Supp.2d 87, 89 (D.Conn.2006) (granting supplemental summary judgment motion), *aff'd,* 225 Fed. Appx. 42 (2d Cir.2007). However, notwithstanding Judge Karas' decision to allow Defendants to file a supplemental

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motion for summary judgment, Plaintiff now argues that Defendants' filing of a supplemental affidavit in support of that motion is improper in that it (1) exceeds the scope of Judge Karas' order, and (2) unfairly prejudices Plaintiff. The Court rejects each of these arguments.

First, to the extent that Plaintiff contends that Defendants exceeded the bounds of Judge Karas' decision by supplementing their motion with a new exhibit, the Court disagrees. Although there is no transcript or written order setting forth Judge Karas' specific instructions with respect to the filing of additional affidavits in connection with the instant motion, the Court notes that the supplemental motion papers in this action were filed well in advance of the reassignment of this case from Judge Karas to the undersigned. If the supplemental motion had, in fact, been broader than contemplated by Judge Karas when he granted permission to file such a motion, or if the motion had included an impermissible exhibit, Judge Karas presumably would have notified the parties that their motion was in violation of his individual practices, which require permission prior to the filing of any motion. *See* Individual Practices of the Honorable Kenneth M. Karas, District Judge, Rule II .A. The fact that no such action was taken confirms that Defendants' supplemental motion was well within the parameters envisioned by Judge Karas.

Indeed, it is inconceivable and contrary to common sense to suggest that Defendants would be *granted* the opportunity to submit a supplemental motion for summary judgment concerning the existence of a legitimate, non-retaliatory basis for Plaintiff's transfer, only to be *denied* the opportunity to support that motion with relevant factual evidence and declarations. Such a ruling would render the granting of Defendants' request to file a supplemental motion little more than an empty gesture. As noted above, there is nothing in the record to suggest that Judge Karas intended such a result. Moreover, the Persaud Declaration, while in one sense "new," merely synthesizes and summarizes testimony and evidence already in the record and developed through the course of discovery (*see* Tr. 26:2-10). Accordingly, it can hardly be argued that the Persaud Declaration goes beyond the bounds of what would be expected of a party pursuing a motion for summary judgment.

*4 Second, Plaintiff's contention that she will be unfairly prejudiced by the filing of Defendants' supplemental affidavit (*see* Tr. 33:11-12) is equally unfounded. In the first place, Plaintiff had ample opportunity to oppose Defendant's supplemental motion for summary judgment, and was allowed to submit affidavits and other evidence in support of that opposition. The fact that Plaintiff chose to submit only a short affidavit in lieu of record evidence, documents, or a memorandum of law is irrelevant to the question of whether Plaintiff was given sufficient opportunity to oppose the instant motion. In addition, as noted above, the facts set forth in the Persaud Declaration are not new and cannot be fairly said to have surprised Plaintiff. With the exception of Persaud's handwritten notes of March 29, 2001, annexed as Exhibit 4 to the Persaud Declaration (*see infra* at 8 n. 2), all of the exhibits annexed to the Persaud Declaration were provided to Plaintiff during discovery and were annexed to Defendants' original summary judgment motion as Defendants' Exhibits D, E, I, and P. (*See* Defs.' Reply Mem. of Law at 2 n. 3; *compare* Defs.' Decl. in Supp. of Defs.' Supp. Motion for Summ. Judg. Exs. 1, 2, 3, and 5 *with* Defs.' Decl. in Supp. of Defs.' Motion for Summ. Judg. Exs. D, E, I, and P.)

Accordingly, there is no reason to disturb Judge Karas's decision to allow Defendants to supplement the summary judgment motion with a new affidavit. The Court will therefore consider the Persaud Declaration and its exhibits.

B. Supplemental Motion for Summary Judgment on Retaliation

Defendants argue that the Persaud Declaration provides evidence of a legitimate, non-retaliatory reason for Plaintiffs job placement, and that, accordingly, summary judgment should be granted and the case closed. For the reasons cited herein, the Court agrees, and grants Defendants' motion for summary judgment on the remaining retaliation claim.

1. Standard of Review

Summary judgment may be granted where it is shown that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must view all evidence in the light most favorable to the non-moving party and must draw all reasonable inferences in his or her favor. *See Tufariello v. Long Island R.R.*, 458 F.3d 80, 85 (2d Cir.2006). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Segal v. City of New York*, 459 F.3d

207, 211 (2d Cir.2006). "Once the moving party has made a properly supported showing sufficient to suggest the absence of any genuine issue as to a material fact, the nonmoving party, in order to defeat summary judgment, must come forward with evidence that would be sufficient to support a jury verdict in his favor." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995). "The motion 'will not be defeated merely ... on the basis of conjecture or surmise.' " *Id.* (quoting *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991)); *see also McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 215 n. 4 (2d Cir.2006) ("[S]peculation alone is insufficient to defeat a motion for summary judgment."). Affidavits submitted in support of or in opposition to the summary judgment motion must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e). "Rule 56(e)'s requirement that the affiant have personal knowledge and be competent to testify to the matters asserted in the affidavit also means that an affidavit's hearsay assertion that would not be admissible at trial if testified to by the affiant is insufficient to create a genuine issue for trial." *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir.2004). "Nor is a genuine issue created merely by the presentation of assertions that are conclusory." *Id.*

***5** The Second Circuit has provided additional guidance regarding summary judgment motions in discrimination cases.

> We have sometimes noted that an extra measure of caution is merited in affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions. *See, e.g., Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir.1994). Nonetheless, "summary judgment remains available for the dismissal of discrimination claims in cases lacking genuine issues of material fact." *McLee v. Chrysler Corp.*, 109 F.3d 130, 135 (2d Cir.1997); *see also Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases").

Schiano v. Quality Payroll Sys., 445 F.3d 597, 603 (2d Cir.2006) (quoting *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir.2001)).

2. Plaintiff's Retaliation Claim

Title VII forbids any employer from "discriminating against any of [its] employees ... because he has made a charge, testified, assisted, or participated in any manner in a [Title VII] investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). The Court reviews plaintiff's retaliation claim under the three-step, burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-03 (1973). *See, e.g., Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 173 (2d Cir.2005); *Murray v. Visiting Nurse Servs.*, No. 05 Civ. 5462(RJS), 2007 WL 3254908, at *9-10 (S.D.N.Y. Oct. 31, 2007). Under this framework, the plaintiff must first establish a prima facie case, thus creating a presumption of retaliation. Should the plaintiff meet that burden, the onus falls on the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. Once an employer offers such proof, the presumption of retaliation dissipates and the employee must show that retaliation was a substantial reason for the adverse employment action. *See Jute*, 420 F.3d at 172.

a. Prima Facie Case

In order to present a prima facie case of retaliation under Title VII, a plaintiff must adduce

> evidence sufficient to permit a rational trier of fact to find [1] that he engaged in protected participation or opposition under Title VII, [2] that the employer was aware of this activity, [3] that the employer took adverse action against the plaintiff, and [4] that a causal connection exists between the protected activity and the adverse action, *i.e.*, that a retaliatory motive played a part in the adverse employment action.

Kessler v. Westchester County Dept. of Soc. Servs., 461 F.3d at 205-06 (quoting *Cifra v. General Electric Co.*, 252 F.3d 205, 216 (2d Cir.2001) (internal quotation marks and alterations omitted)); *see also Jute*, 420 F.3d at 173; *Feingold v. New York*, 366 F.3d 138, 156 (2d Cir.2004); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2d Cir.1998).

***6** With respect to Plaintiff's placement in the Pediatric Laboratory rather than the General Hematology Laboratory, Judge Karas concluded that Plaintiff had met her prima facie burden. *See Hill*, 467 F.Supp.2d at 364-65. First, he held that Plaintiff had shown participation in a protected activity and that the activity was known to the defendants. *See id.* at 362. Second, he determined that Plaintiff had shown that her assignment to the Pediatric Laboratory rather than the General

Hematology Laboratory was an adverse action under the new standard promulgated in *Burlington Northern and Santa Fe Railroad Company v. White*, 126 S.Ct. 2405 (2006). *See Hill*, 467 F.Supp.2d at 363. Finally, he found that there was a causal connection between the protected activity and the adverse action because Plaintiffs allegations of retaliation were "sufficiently close in time to the complaints she made to the EEOC to support her prima facie case." *Id.* at 364.

b. A Legitimate, Non-Retaliatory Reason for the Employment Action

With the prima facie case established, the burden shifts to Defendants to present a legitimate, non-discriminatory rationale for their conduct. *See Quinn*, 159 F.3d at 768-70. Judge Karas concluded that, with respect to Plaintiffs placement in the Pediatric Laboratory instead of the General Hematology Laboratory, the institutional defendants had failed to provide any explanation for the placement. He held that, without any explanation, "the only evidence on the record supports Plaintiff's claim of retaliatory action. Thus, summary judgment on Plaintiff's claim that her placement in the Pediatric Laboratory was retaliatory must be denied." *Hill*, 467 F.Supp.2d at 366.

After being granted leave to supplement their motion for the reasons noted above, Defendants now argue that the evidence shows that there was a legitimate, non-retaliatory reason for assigning Plaintiff to the Pediatric Laboratory as opposed to the General Hematology Laboratory. Specifically, Defendants allege that Plaintiff could not perform the functions required of a Laboratory Associate in the General Hematology Laboratory, and accordingly, was assigned to work in the Pediatric Laboratory. (*See* Defs.' Mem. of Law in Supp. of Defs.' Supp. Mot. for Summ. J. at 4, Persaud Decl. at ¶ 14.)

It is undisputed that Plaintiff transferred to Bellevue Hospital in the spring of 2000 and was assigned to the Hematology Laboratory. (*See* Defs.' Supp. Mem. at 3; Pl.'s Decl. at ¶ 7.) The Hematology Laboratory at that time was divided between the General Hematology Laboratory and the Pediatric Laboratory. (Persaud Decl. at ¶ 4.) Laboratory Associates assigned to the General Hematology Laboratory performed various tests and analysis on blood and urine. (*Id.*) Laboratory Associates assigned to the Pediatric Laboratory were assigned to perform phlebotomy, which is the drawing of blood. (*Id.*)

At the time Plaintiff transferred to Bellevue, new employees and transfer employees assigned to the Hematology Laboratory were rotated through the General Hematology Laboratory and the Pediatric Laboratory. (Persaud Decl. at ¶ 6.) The purpose of the rotation was to orient employees to the two laboratories and determine their level of competence in the types of analysis performed in the labs. (*Id.*) The rotation included training in phlebotomy as well as chemical and microscopic analysis of blood and urine. (*Id.*) Plaintiff was initially staffed in the General Hematology Laboratory. (*Id.* at ¶ 7.) Like other new employees, Plaintiff was assigned various tasks and tested on her ability to complete those tasks. (*Id.*) Plaintiff was provided with six weeks of training, yet even with the training was not able to perform the basic laboratory techniques and analysis required by the General Hematology Laboratory. (*Id.* at ¶ 10; Hill Perf. Eval. of Jan. 3, 2001.) On or about June 12, 2000, Plaintiff was given three slides for evaluation, in a routine test. (*Id.* at ¶ 8.) Plaintiff failed to properly evaluate all three slides. (*Id.*; *see also* Persaud Mem. of June 12, 2000.) Six months after Plaintiff began work, she received a performance evaluation, which noted that Plaintiff "[c]annot grasp basic Hematology procedures and apply them," and that "[i]t has been difficult to train Ms. Hill in basic laboratory procedures due to gaps in fundamental lab techniques." (Hill Perf. Eval. of Jan. 3, 2001 at 0292 and 0294.) As a result of Ms. Hill's poor evaluation, she was provided with two additional weeks of training. (*Id.* at 0297; Raboy-Braunstein Mem. of Jan. 3, 2001.) In or around March 28, 2001, Persaud tested Plaintiff and noted that she was unable to identify red blood cells in a urine microscope. (*See* Notes of Persaud, Mar. 28, 2001.)[7] This indicated to Persaud that, despite the additional training, Plaintiff could not perform the analysis required in the General Hematology Laboratory. (*See* Persaud Decl. at ¶ 12.)

*7 Finally, on April 2, 2001, Plaintiff's one-year employment evaluation indicated that she continued to be "unable to grasp basic procedures in Hematology at a competent level of performance." (*See* Hill Perf. Eval. of Apr. 2, 2001.) Accordingly, Defendants assigned Plaintiff to the Pediatric Laboratory, instead of the General Hematology Laboratory. (*See* Persaud Decl. at ¶ 14.)

Defendants have thus satisfied their burden of production by articulating a legitimate, nondiscriminatory reason for Plaintiffs placement in the Pediatric Laboratory instead of the General Hematology Laboratory. *See Patterson*, 375 F.3d at 221 (observing that, under step two, the employer must satisfy its "burden of production" by "articulat[ing] some legitimate, nondiscriminatory reason for the termination supported by admissible evidence which, if believed by the trier of fact, would support a finding that

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unlawful discrimination was not the cause of the employment action") (internal quotations marks and citations omitted).

c. Pretext

The final step under the *McDonnell-Douglas* analysis requires Plaintiff to establish that retaliation was a "substantial reason" for the adverse employment action. *Jute*, 420 F.3d at 173. "A reason cannot be proved to be a pretext ... unless it is shown both that the reason was false, and that discrimination [or retaliation] was the real reason." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993) (emphases and internal quotation marks omitted). "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Patterson*, 375 F.3d at 221 (internal quotations omitted). Plaintiff must "produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false." *Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 717 (2d Cir.1994) (internal quotations omitted). In meeting this evidentiary burden for the purposes of a summary judgment motion, the plaintiff must produce evidence in the record that shows that there is a genuine issue of fact. Neither conclusory assertions, *see Patterson*, 375 F.3d at 219; *see also Smith v. American Express Co.*, 853 F.2d 151, 154-55 (2d Cir.1988) (affirming summary judgment in light of plaintiff's failure to present more than conclusory and substantially unsupported assertions that employer's proffered race-neutral rationale for denial of promotion was pretext), nor contentions that the affidavits supporting the motion are not credible, *see Goenaga v. March of Dimes Birth Defects Found*, 51 F.3d 14, 18 (2d Cir.1995), create a genuine issue of fact.

The Court finds that there is insufficient evidence in the record for a reasonable jury to conclude that Defendants' proffered reason for placing Plaintiff in the Pediatric Laboratory instead of the General Hematology Laboratory was a pretext for retaliation. Plaintiff first asserts that Persaud "was not in a position to make an intelligent decision whether [she] was competent to perform in General Hematology." (Pl.'s Decl. at ¶¶ 3-4.) She also alleges that the person who trained her, Margaret Refen, was not college-trained and made errors. (PL's Decl. at ¶ 7.) Finally, she submits that she was not tested properly, that Persaud fabricated testing results by changing the labels on her test slides to ensure that she failed, and that, in any case, she had been told that she had performed well. (Pl.'s Decl. at ¶¶ 8-9.)

*8 These conclusory allegations contained in Plaintiff's Declaration are not supported by any evidence in the record. General accusations that Defendants fabricated records, lied, and were incompetent, unsupported by any record evidence, cannot satisfy Plaintiff's burden. *See Patterson*, 375 F.3d at 219; *Goenaga*, 51 F.3d at 18; *Smith*, 853 F.2d at 154-55. Moreover, to the extent that Plaintiff alleges that she was not properly trained in urinalysis and that the people performing the training and testing were not qualified (*see* Pl.'s Decl. at ¶¶ 4, 3, 7, and 8), these unsupported allegations were previously rejected by Judge Karas. *See Hill*, 467 F.Supp.2d at 353 (concluding that there was "little evidence that Plaintiff was denied training," and that "Defendants have produced an abundance of evidence that Plaintiff received significant amounts of training in both hematology and urinalysis after she failed the test"). Judge Karas also rejected Plaintiffs unsupported allegations that Defendants lied and fabricated records. *See id.* at 366.

Aside from the unsupported and conclusory allegations in Plaintiff's affidavit, the only remaining evidence of retaliation is the temporal proximity between Plaintiff's protected activity and the placement she alleges to be retaliatory. Although Judge Karas found that this temporal proximity was sufficient to establish Plaintiff's burden in the first step of the *McDonnell Douglas* analysis, *see Hill*, 467 F.Supp.2d at 363-64, that finding is not independently sufficient to establish that Defendant's proffered reason is pretextual. The "timing of events alone, even if sufficient to meet the plaintiff's prima facie burden, cannot defeat summary judgment in the face of defendant's proffered legitimate reason." *Reilly v. Metro-North Commuter R.R. Co.*, No. 93 Civ. 7317, 1996 WL 665620, at *14 (S.D.N.Y. Nov. 15, 1996). Indeed, "mere temporal proximity, by itself, is insufficient to support a claim of retaliation at the summary judgment stage, at least where the defendant proffers a legitimate reason for the plaintiffs discharge with evidentiary support therefor." *Murray*, 2007 WL 3254908, at *15 n. 14 (internal quotation marks omitted); *see Vosatka v. Columbia Univ.*, No. 04 Civ. 2936(LAP), 2005 WL 2044857, at *10 (S.D.N.Y. Aug. 25, 2005) (holding that "close temporal proximity ... alone, is insufficient as a matter of law to infer discrimination on the part of [defendant] once [defendant] has proffered legitimate non-discriminatory reasons" and collecting cases).

Even if the Court were to credit Plaintiff's unsupported allegations and conclusory assertions and determine that the reason for Plaintiff's placement was false, Plaintiff has nevertheless failed to make any showing that these actions were motivated by retaliation. "A reason cannot

be proved to be a pretext ... unless it is shown both that the reason was false, and that discrimination [or retaliation] was the real reason." *St. Mary's Honor Center*, 509 U.S. at 515 (emphases and internal quotation marks omitted). Plaintiff has failed even to allege that retaliation was the "real reason" for her placement in the Pediatric Laboratory. Indeed, Plaintiff proffers absolutely no explanation for why Persaud and others would endeavor so vigilantly to disqualify Plaintiff from her preferred placement. There is simply no evidence for the proposition that retaliation motivated the placement of the Plaintiff in the Pediatric Laboratory rather than the General Hematology Laboratory.

*9 Plaintiff has thus failed to provide the Court with any evidence explaining her failure to meet the standards of the General Hematology Laboratory. No reasonable fact-finder could conclude, on this record, that there is a genuine issue of fact going to whether the reason provided for Plaintiff's placement in the Pedialric Laboratory was false. Accordingly, because the evidence as a whole is insufficient for a fact-finder to conclude that defendants' proffered reasons for placing Plaintiff in the Pediatric Laboratory' were a pretext for retaliation, Plaintiff's retaliation claim is dismissed.

III. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is GRANTED. The Clerk of the Court shall enter judgment.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 231439

Footnotes

1 Defendant Rayboy-Brauestein's name is misspelled in the Complaint and was therefore misspelled on the docket and in the caption for this action. Because memoranda signed by the Defendant herself use "Carole Raboy-Braunstein," the Court will adopt that spelling of the Defendant's name.

2 Plaintiff disputes the admissibility of Persaud's Notes of March 28, 2001. (Pl.'s Decl. at ¶ 10-11.) Even if the Court concluded that the document was inadmissible-a conclusion for which Plaintiff offers no legal authority-Defendants would nevertheless have succeeded in establishing a legitimate, nondiscriminatory reason for placing Plaintiff in the Pediatric Laboratory based on the remaining evidence establishing that Plaintiff had failed to meet the basic requirements of working on the General Hematology Laboratory.

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664 F.Supp.2d 307
United States District Court, S.D. New York.

Nahshon JACKSON, Plaintiff,
v.
Glen S. GOORD, George J. Bartlett, Christopher P. Artuz, R. Seitz, A. Pelc, George A. Smith, McClean, Lynn Forgit, J.P. Reilly, Hennessey and Shambo, Defendant.

No. 97 CV 7149(GBD)(MHD)
|
Sept. 21, 2009.

Synopsis
Background: State prisoner brought action against correctional staff and officials, alleging that defendants had violated his constitutional rights. After granting summary judgment for defendants with respect to all of prisoner's claims, except for his environmental claims, defendants filed supplemental motion for summary judgment on the environmental claims.

[Holding:] In adopting report and recommendation of United States Magistrate Judge Michael H. Dolinger, the District Court, George B. Daniels, J., held that summary judgment in favor of prison defendants was precluded on inmate's Eighth Amendment claims based on prison's environmental conditions.

Motions denied.

West Headnotes (14)

[1] **Federal Civil Procedure** Error by court

A motion for reconsideration will be granted by a district court only where the court has overlooked matters or controlling decisions which, had they been considered, might reasonably have altered the result reached by the court.

[2] **Federal Civil Procedure** Further evidence or argument

A motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the court, nor may it be used as a vehicle for relitigating issues already decided by the court.

3 Cases that cite this headnote

[3] **Federal Civil Procedure** Grounds and Factors

Major grounds justifying reconsideration are an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

[4] **Summary Judgment** Subsequent Proceedings

District courts have authority to permit parties to file supplemental summary judgment motions.

[5] **Summary Judgment** Renewed or successive motions

In deciding whether to address substantive merits of supplemental summary judgment motion, court considers the strong interests of judicial efficiency, finality, and scarce judicial resources, as well as any prejudice to the

nonmovant in having to respond to an additional motion and having his case further delayed.

3 Cases that cite this headnote

[6] **Sentencing and Punishment**—Conditions of Confinement

In order for state claim against prison official for an Eighth Amendment violation, the deprivation alleged must be, objectively, sufficiently serious, official's act or omission must result in the denial of the minimal civilized measure of life's necessities, and prison official must have a sufficiently culpable state of mind. U.S.C.A. Const.Amend. 8.

5 Cases that cite this headnote

[7] **Sentencing and Punishment**—Conditions of Confinement

In order for a prisoner to establish an Eighth Amendment claim based on a failure to prevent harm, the prisoner must show that he is incarcerated under conditions posing a substantial risk of serious harm; prisoner need not show actual injury. U.S.C.A. Const.Amend. 8.

10 Cases that cite this headnote

[8] **Sentencing and Punishment**—Deliberate indifference in general

In order to be subject to liability for an Eighth Amendment violation, a prison official must know of and disregard an excessive risk to inmate health or safety; official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, draw the inference and fail to take reasonable measures to abate it. U.S.C.A. Const.Amend. 8.

7 Cases that cite this headnote

[9] **Civil Rights**—Nominal damages

Plaintiffs in § 1983 actions are entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury. 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[10] **Civil Rights**—Criminal law enforcement; prisons
Summary Judgment—Prisons and jails

Genuine issues of material fact existed as to conditions in prison auto body shop when inmate worked there, the risk that the toxic materials in the shop created, and whether inmate's alleged headaches, nosebleed, and nausea were related to his work at the auto body shop, precluding summary judgment in favor of prison defendants on inmate's Eighth Amendment claim. U.S.C.A. Const.Amend. 8.

[11] **Civil Rights**—Criminal law enforcement; prisons
Summary Judgment—Prisons and jails

Genuine issues of material fact existed as to whether prisoner was exposed to asbestos for four to five hours a day over an extended period of time, and whether there was a risk to his health as a result of such exposure, precluding summary judgment in favor of prison defendants on prisoner's Eighth Amendment claim based on asbestos exposure. U.S.C.A. Const.Amend. 8.

[12] **Civil Rights** Criminal law enforcement; prisons
Summary Judgment Prisons and jails

Genuine issues of material fact existed as to whether prisoner was exposed to an unreasonable risk of serious harm from prison's water quality or from exposure to cigarette smoke, and whether prison defendants knew that prisoner faced substantial risks of serious harm and disregarded those risks by failing to take reasonable measures to abate the risks, precluding summary judgment in favor of prison defendants on prisoner's Eighth Amendment claims. U.S.C.A. Const.Amend. 8.

3 Cases that cite this headnote

[13] **Civil Rights** Liability of Public Employees and Officials
Civil Rights Vicarious liability and respondeat superior in general; supervisory liability in general

Personal involvement of government official in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983; requisite personal involvement may be shown by establishing that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. 42 U.S.C.A. § 1983.

12 Cases that cite this headnote

[14] **Civil Rights** Criminal law enforcement; prisons
Summary Judgment Prisons and jails

Genuine issue of material fact existed as to whether prison superintendent knew of the allegedly ongoing constitutional violations and, had the authority to correct the problems and failed to do so, precluding summary judgment in favor of superintendent on prisoner's Eighth Amendment claims based on prison's environmental conditions. U.S.C.A. Const.Amend. 8.

1 Case that cites this headnote

Attorneys and Law Firms

*309 Nahshon Jackson, Malone, NY, pro se.

Andrew Charles Tsunis, Dennis C. Vacco, Inna Reznik, Attorney General of the State of N.Y., New York, NY, for Defendants.

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, District Judge:

Pro se Plaintiff brought this action alleging several violations of his constitutional rights. As the basis of his claims, Plaintiff asserts that (1) he was exposed to a host of toxic and dangerous environmental conditions, (2) he was denied adequate medical care for various maladies, (3) he was denied due process in a disciplinary hearing, (4) he was sexually assaulted by a prison officer, (5) his legal dictionary was improperly confiscated from him, and (6) he was improperly removed from his work site at the prison. Following the completion of discovery, Defendants filed a Motion for Summary Judgment. This Court referred the matter to Magistrate Judge Michael H. *310 Dolinger for a Report and Recommendation.

Magistrate Judge Dolinger issued a Report and Recommendation ("Report") recommending that the Defendants' Motion for Summary Judgment be granted with respect to all of Plaintiff's claims, except for the environmental claims. This Court previously adopted the Report's recommendation.

Defendants subsequently filed a supplemental Motion for Summary Judgment on the environmental claims. The Court again referred the matter to Magistrate Judge Dolinger for a Report and Recommendation. Magistrate Judge Dolinger issued a Report and Recommendation ("Report II") recommending that the Defendants' Motion for Summary Judgment be denied. The Court adopts Report II's recommendation that Defendants' Supplemental Motion for Summary Judgment on the environmental claims be denied.

The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within Report II. 28 U.S.C. § 636(b)(1). When there are objections to a report, the Court must make a *de novo* determination of those portions of the report to which objections are made. *Id.*; *see also Rivera v. Barnhart*, 423 F.Supp.2d 271, 273 (S.D.N.Y.2006). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. *See* Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1)(c). It is not required, however, that the Court conduct a *de novo* hearing on the matter. *See United States v. Raddatz*, 447 U.S. 667, 676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980). Rather, it is sufficient that the Court "arrive at its own, independent conclusions" regarding those portions to which objections were made. *Nelson v. Smith*, 618 F.Supp. 1186, 1189–90 (S.D.N.Y.1985) (quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir.1983)). When no objections to a report are made, the Court may adopt the report if there is no clear error on the face of the record. *Adee Motor Cars, LLC v. Amato*, 388 F.Supp.2d 250, 253 (S.D.N.Y.2005) (citation omitted). In his report, Magistrate Judge Dolinger advised the parties that failure to file timely objections to Report II would constitute a waiver of those objections. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b). Neither party filed objections.

Magistrate Judge Dolinger determined that considering all the evidence presented by the parties, a reasonable fact-finder could find that Plaintiff was exposed to an unreasonable risk of serious harm from the environmental conditions. As to Plaintiff's specific environmental claims, Magistrate Judge Dolinger found that (1) the additional evidence proffered by Defendants did not suffice to show an absence of dispute as to the material facts concerning the conditions in the auto body shop, (2) Defendants failed to provide any evidence disputing Plaintiff's claim that he was exposed to asbestos for four to five hours a day over an extended period of time, or Plaintiff's claim that there is a risk to his health as a result of such exposure, (3) Defendants proffered no evidence with respect to Plaintiff's complaints about his cell having poor ventilation, inadequate heating and hot water and also misrepresented the record, (4) Plaintiff's evidence as to the quality of water and whether or not it posed a serious risk to Plaintiff remains a triable issue, and (5) Defendants failed to provide additional evidence regarding the exposure to cigarette smoke claim. Furthermore, Magistrate Judge Dolinger determined that whether or not Defendants acted with deliberate indifference remained a triable issue of fact. Similarly, Magistrate Judge Dolinger found that the issue of whether or not defendant Christopher Artuz was personally involved in any of Plaintiff's environmental claims also remains a triable issue. In light of *311 the Defendants' failure to demonstrate the absence of triable issues of fact, the magistrate judge correctly denied Defendants' Supplemental Motion for Summary Judgment on the environmental claims.

After carefully reviewing Report II, the Court finds that the report is not facially erroneous, and adopts Report II in its entirety. Accordingly, the Defendants' supplemental Motion for Summary Judgment on the environmental claims is denied.

SO ORDERED.

REPORT & RECOMMENDATION

Opinion

MICHAEL H. DOLINGER, United States Magistrate Judge.

TO THE HONORABLE GEORGE B. DANIELS, U.S.D.J.:

Plaintiff Nahshon Jackson, an inmate in the New York State correctional system, filed this lawsuit in 1997 against a number of correctional staff and officials at Green Haven Correctional Facility ("Green Haven"). He alleged that defendants had violated his constitutional rights because (1) he was exposed to a host of toxic and dangerous environmental conditions in the prison, (2) he

was denied adequate medical care for various maladies, (3) he was denied due process in a disciplinary hearing, (4) he was sexually assaulted by a prison officer, (5) his legal dictionary was improperly confiscated from him, and (6) he was improperly removed from his work site at the prison.

Following the completion of discovery, defendants filed a motion for summary judgment, and on August 30, 2005, the District Court adopted our Report and Recommendation, granting summary judgment for defendants with respect to all of plaintiff's claims except for his environmental claims against defendants Christopher P. Artuz, George Smith, James P. Reilly, and Dick Hennessey, and his failure-to-treat claim against one defendant, Lynn Forgit. Defendants subsequently filed a supplemental motion for summary judgment on the environmental claims. Plaintiff opposes the motion.

For the reasons that follow, we recommend that defendants' motion be denied.

Plaintiff's Environmental Claims—Prior Proceedings

Plaintiff alleges harm from a host of environmental problems at Green Haven. His major environmental complaints are of (1) exposure to harmful chemicals through his work assignment at the auto body shop, (2) asbestos exposure in an area in Green Haven known as the J–School, (3) conditions in his cell, including bacteria in the ventilation system, (4) contamination of the drinking water, and (5) cigarette smoke exposure in the medical holding cell. (Compl.¶¶ 13–23, 29, 31, 33–35, 36–39).[1]

In arguing for summary judgment on the environmental claims in their first motion, defendants proffered affidavits from Green Haven officials concerning the conditions in the auto body shop, some documents relating to the testing of Green Haven's water supply, and plaintiff's deposition testimony. (R & R 39). In recommending denial of summary judgment on these claims, we found that plaintiff's deposition testimony demonstrated the existence of triable disputes as to material facts about the conditions to which plaintiff was subjected in the auto body shop. (*Id.* at 46). As to the other environmental claims, we noted that in defendants' moving papers they had simply asserted, without ***312** explanation, that plaintiff could not "substantiate that any of the claims rise to the level of Eighth Amendment violations," that they had failed to point to anything in the record that would demonstrate the absence of a triable issue with respect to those claims, and that plaintiff's testimony demonstrated triable issues with respect to some or all of the claims. (*Id.* at 43–44). The District Court adopted our Report and Recommendation on August 8, 2005.

On August 25, 2005, defendants submitted a letter to the court requesting permission to file a supplemental motion for summary judgment to address the environmental claims. (Aug. 25, 2005 letter to the Hon. George B. Daniels from Assistant Att'y General Christine A. Ryan). Defendants stated that the previous summary-judgment motion had been filed by an attorney who was no longer with the office and that they could further develop the record to dispose of the claims before trial. (*Id.*). The court denied this request on August 30, 2005, and issued an amended order adopting our Report and Recommendation on that same day.

The court subsequently held a conference with the parties on April 12, 2007 in which defendants renewed their request to submit a supplemental summary judgment motion. (Tr. 2–3). The court granted this request, referring the motion to us. (*Id.* at 3). During the conference, plaintiff objected to the request, saying that he would be prejudiced because the case had been pending for many years, and because he had lost some of his papers in the course of being moved around to different prisons. (*Id.* at 5–6). The court told plaintiff that he could bring up those arguments in his response to the supplemental motion. (*Id.* at 6).

Following a telephone conference with the parties, we issued an order directing defendants to serve and file their renewed summary judgment motion, (a) presenting any additional arguments and evidence they have, (b) addressing their failure to include such information in their original motion, and (c) discussing why they should be permitted to submit a supplemental motion. (Order dated May 3, 2007). The order also stated that plaintiff may address any prejudice that may result from defendants' filing of the motion in his response. (*Id.*).

The Supplemental Motion

In their supplemental motion, defendants argue (1) that plaintiff has failed to show that the environmental conditions of which he complains rise to the level of an Eighth Amendment violation, and (2) that defendant Artuz was not personally involved in any constitutional violation and therefore the remaining claims against him should be dismissed. In support of their motion,

defendants submit six additional affidavits from Department of Correctional Services ("DOCS") personnel, and resubmit some water inspection records and plaintiff's medical records.

Plaintiff opposes the motion, arguing (1) that the filing of the supplemental motion amounts to a motion for reconsideration and that defendants do not show grounds justifying reconsideration, (2) that the declarations submitted with the motion do not contain any new evidence and make false representations, and that there remain genuine issues of material fact as to the environmental claims, and (3) that he has proffered sufficient evidence to demonstrate a genuine issue of material fact on the personal involvement of defendant Artuz. In addition to his own affidavit, he submits the affidavit of Randolf Rossi, an inmate who worked with plaintiff in the auto body shop at Green Haven and who testifies about the conditions in the shop. (Aff. of Nahshon Jackson, executed Jun. 28, 2007 ("Jackson Aff. 2") Ex. C).

*313 *ANALYSIS*

I. *Supplemental Motion Filing Standards*

Plaintiff argues that the current supplemental motion amounts to a motion for reconsideration of the court's earlier decision partially denying defendants' previous motion for summary judgment, and that since the submitted papers do not meet the requirements for a filing of such a motion, the motion should not be considered. (*Id.* at ¶¶ 4–5).

Despite being directed in our order to explain both their failure to include the supplemental information in their original summary judgment motion and the reasons why they should be permitted to submit the current motion, defendants did not address those issues in their initial memorandum. However, in their reply memorandum, they explain their conduct by stating that the attorney who filed the original motion is no longer with their office, and that he or she neglected to file affidavits containing sufficient information regarding the environmental claims. (Defs.' Reply Mem. 3–4). They argue that "they should not be penalized for their former attorney's failure to provide sufficient factual support for these arguments in their opening motion." (*Id.* at 4).

[1] [2] [3] "A motion for reconsideration will be granted by a district court only where the court has 'overlooked matters or controlling decisions which, had they been considered, might reasonably have altered the result reached by the court.' " *Campbell v. Cantor Fitzgerald & Co., Inc.*, 205 F.3d 1321, 1321 (2d Cir.1999) (quoting *Adams v. United States*, 686 F.Supp. 417, 418 (S.D.N.Y.1988)); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995); Local Civil Rule 6.3 ("There shall be served with the notice of motion [for reconsideration] a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked."). Reconsideration is not lightly granted:

> Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources. A motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court. The major grounds justifying reconsideration are an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

RST (2005) Inc. v. Research in Motion Ltd., 597 F.Supp.2d 362, 365 (S.D.N.Y.2009) (internal quotations omitted); *see Chang v. United States*, 250 F.3d 79, 86 n. 2 (2d Cir.2001).

Plaintiff correctly notes that under this standard, defendants' additional submissions should not be considered by this court, as the information they present was available at the time of the filing of the original motion and they give what is at best a flimsy explanation as to why their office neglected to submit the information the first time. *See United States v. Billini*, 2006 WL 3457834, at *1–2 (S.D.N.Y. Nov. 22, 2006) (denying motion for reconsideration where, *inter alia*, "request for reconsideration rests entirely on new theories, arguments, and facts that were not previously presented to the Court" and there was no argument "that the evidence contained in [the supplemental] affidavit was not previously available to [the party] or could not have been obtained through diligent efforts.").

[4] Defendants label their submission as a "**Supplemental** Motion for Summary Judgment," and district **courts** have wide discretion to allow such **supplemental filings**. *314 *Hill v. Rayboy–Brauestein*, 2008 WL 231439, at *2–3 (S.D.N.Y. Jan. 24, 2008) ("There can be no doubt that district **courts** have **authority** to permit parties to file **supplemental** summary judgment motions"). Nonetheless, courts typically judge whether to grant leave

to file a supplemental motion based on criteria similar to those governing motions for reconsideration. Those include whether there has been a change in the law, or whether new evidence has come to light that was not previously available. *Id.* (change in the law); *Mendoza v. Goord*, 2002 WL 31654855, at *1 (S.D.N.Y. Nov. 21, 2002) (same); *Heath v. Saddlemire*, 2002 WL 31242204, at *1 (N.D.N.Y. Oct. 7, 2002) (same).

[5] Even if we were to deem defendants' submission a supplemental motion rather than a motion for reconsideration, we still must exercise our discretion in deciding whether to address its substantive arguments. In making this decision, we consider the strong interests of judicial efficiency, finality, and scarce judicial resources discussed by the courts in setting the standards for motions for reconsideration, as well as any prejudice to the plaintiff in having to respond to an additional motion and having his case further delayed. *See RST (2005) Inc.*, 597 F.Supp.2d at 365; *Discovision Assocs. v. Toshiba Corp.*, 2009 WL 1904518, at *1 (S.D.N.Y. June 30, 2009). As noted, defendants do not cite any change in the law or new evidence that was unavailable to them at the time of their original motion, and we do not find defendants' bare-boned reasons for filing their supplemental motion and the scant amount of additional information they have provided sufficiently compelling to balance the interests discussed above. Given these considerations, we recommend denying defendants' supplemental motion on these grounds. In any event, as an alternative matter, we address the merits of their motion and recommend its denial on its merits.[3]

II. *Summary Judgment Standard*

The court may enter summary judgment only if it concludes that there is no genuine dispute as to the material facts and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Feingold v. New York*, 366 F.3d 138, 148 (2d Cir.2004). "An issue of fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law' [while] [a]n issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Shade v. Hous. Auth. of the City of New Haven*, 251 F.3d 307, 314 (2d Cir.2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). It is axiomatic that the responsibility of the court in deciding a summary-judgment motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986); *see, e.g., Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Howley v. Town of Stratford*, 217 F.3d 141, 150–51 (2d Cir.2000).

The party moving for summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the "pleadings, the discovery and disclosure materials *315 on file, and any affidavits" that demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P. 56(c); *see, e.g., Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *Koch v. Town of Brattleboro*, 287 F.3d 162, 165 (2d Cir.2002). If the non-moving party has the burden of proof on a specific issue, the movant may satisfy its initial burden by demonstrating the absence of evidence in support of an essential element of the non-moving party's claim. *See, e.g., Celotex*, 477 U.S. at 322–23, 325, 106 S.Ct. 2548; *PepsiCo, Inc. v. Coca–Cola Co.*, 315 F.3d 101, 105 (2d Cir.2002); *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir.1995). If the movant fails to meet its initial burden, the motion will fail even if the opponent does not submit any evidentiary materials to establish a genuine factual issue for trial. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 161, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Giannullo v. City of New York*, 322 F.3d 139, 140–41 (2d Cir.2003).

If the moving party carries its initial burden, the opposing party must then shoulder the burden of demonstrating a genuine issue of material fact. *See, e.g., Beard v. Banks*, 548 U.S. 521, 529, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006); *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *Santos v. Murdock*, 243 F.3d 681, 683 (2d Cir.2001). In doing so, the opposing party cannot rest "merely on allegations or denials" of the factual assertions of the movant, Fed.R.Civ.P. 56(e); *see, e.g., Amaker v. Foley*, 274 F.3d 677, 680–81 (2d Cir.2001), nor can it rely on its pleadings or on merely conclusory factual allegations. *See, e.g., Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir.2000). It must also "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Woodman v. WWOR–TV, Inc.*, 411 F.3d 69, 75 (2d Cir.2005). Rather, it must present specific evidence in support of its contention that there is a genuine dispute as to the material facts. *See, e.g., Celotex*, 477 U.S. at 324, 106 S.Ct. 2548; *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 526 (2d Cir.1994).

In order to show a "genuine dispute" of material fact, the opposing party must demonstrate that there is sufficient evidence for a reasonable jury to find in its favor. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505; *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348; *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 455–56 (2d Cir.2007) (citing *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505). If "the party opposing summary judgment propounds a reasonable conflicting interpretation of [the] material disputed fact[s]," summary judgment must be denied. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 9–10 (2d Cir.1983).

III. *Environmental Claims*

Defendants argue that none of plaintiff's environmental claims are serious enough to rise to the level of an Eighth Amendment violation. (Defs.' Mem. 9–10). They also argue that none of the conditions posed an unreasonable risk of serious damage to plaintiff's health, and that defendants' state of mind did not amount to deliberate indifference. (Defs.' Mem. 14). We address each of these claims in turn after discussing the standards for an Eighth Amendment violation.[3]

A. *The Eighth Amendment*

[6] Prison officials' liability for confinement conditions is governed by the Eighth ***316** Amendment and is determined by a two-part test. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). First, "the deprivation alleged must be, objectively, sufficiently serious ... [and] a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." *Id.* Second, "a prison official must have a sufficiently culpable state of mind." *Id.*; *see also Trammell v. Keane*, 338 F.3d 155, 161 (2d Cir.2003); *Gaston v. Coughlin*, 249 F.3d 156, 164 (2d Cir.2001).

[7] Under the objective element of the test, the measure of a "sufficiently serious" deprivation is "contextual and responsive to contemporary standards of decency." *Hudson v. McMillian*, 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). As the Supreme Court stated in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989):

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being .... [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment....

Id. at 199–200, 109 S.Ct. 998 (internal citations omitted). "[F]or a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970. A prisoner need not show actual injury, as "the Eighth Amendment protects against sufficiently imminent dangers as well as current unnecessary and wanton infliction of pain and suffering." *Helling v. McKinney*, 509 U.S. 25, 34, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

As noted in our previous Report and Recommendation, the Eighth Amendment inquiry in plaintiff's case focuses on the danger posed by the material itself—that is, whether the nature and levels of plaintiff's exposure to toxic or noxious substances was such as to pose "an unreasonable risk" of serious damage to the health of any inmate exposed to it. *Helling*, 509 U.S. at 36, 113 S.Ct. 2475. This requires a fact-finder to assess

> the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to [the toxin] ... [and] whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.

Id. (emphasis in original).

[8] Under the subjective test, a prison official must act with " 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970 (quoting *Wilson v. Seiter*, 501 U.S. 294, 302–03, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). This means that "a prison official must know of and disregard an excessive risk to inmate health or safety; the official must ... be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, ... draw the inference and fail to take reasonable measures to abate it."

Trammell, 338 F.3d at 164 *317 (citing *Farmer*, 511 U.S. at 837, 847, 114 S.Ct. 1970); *see also Phelps v. Kapnolas*, 308 F.3d 180, 185–86 (2d Cir.2002) (citing *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970). This element "entails something more than mere negligence ... but something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir.1996) (citing *Farmer*, 511 U.S. at 835, 114 S.Ct. 1970). Plaintiff need not show actual knowledge of the risk of harm, but rather can

> present [ ] evidence showing that a substantial risk ... was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it.

Farmer, 511 U.S. at 842, 114 S.Ct. 1970.

[9] Finally, we note that plaintiffs in section 1983 actions are "entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir.1999) (citing *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir.1984)); *see Patterson v. City of Utica*, 370 F.3d 322, 337 (2d Cir.2004); *Gibeau v. Nellis*, 18 F.3d 107, 111 (2d Cir.1994). Thus, if plaintiff can establish that the levels of alleged exposure to toxic substances at Green Haven posed a significant risk of serious harm, then he will have proven an Eighth–Amendment violation and be entitled at least to nominal damages.

B. *The Specific Environmental Claims*

i. *The Auto Body Shop*

[10] Plaintiff asserts that he was exposed to toxic chemicals and fumes while working in the Green Haven auto body shop, that he was not given proper safety instructions or equipment while working in the shop, that the shop's ventilation system was inadequate, and that these conditions created a serious risk to his health. (Defs.' Notice of Mot. dated Mar. 31, 2000, Ex. Q ("Dep.") 19–33; Aff. of Nahshon Jackson, dated May 9, 2000 ("Jackson Aff. I") ¶¶ 10–14; Compl. ¶¶ 13–23). In addressing plaintiff's auto body shop claims in their first set of summary-judgment papers, defendants proffered affidavits of three prison officials—George Smith, the Senior Industrial Superintendent at Green Haven; James P. Reilly, the first officer in charge of the shop; and Dick Hennessey, the second officer in charge of the shop. These officials' testimony principally asserted that plaintiff had signed a safety precaution form and that generally the inmates were required to use safety equipment. (R & R 40–43). The court denied summary judgment for defendants on this claim, as we found "an existence of triable disputes as to the material facts" based on the contradictions between the officials' testimony and plaintiff's testimony about the shop's conditions. (*Id.* at 44–46).

In support of their supplemental motion, defendants proffer two additional declarations on this issue, from William Tardella, General Industrial Training Supervisor at Green Haven, and Arthur Patterson, Industrial Training Supervisor at Green Haven, both of whom testify about the general operation and safety procedures of the Green Haven auto body shop.

Tardella testifies that the shop had doors and windows that opened as well as a fan in the back wall of the shop to ventilate the area, that safety standards are taught to inmates prior to their beginning work at the shop, that inmates had access to "Material Data Safety Sheets" that listed "what the items they were working with contained," and that safety *318 equipment and showers were available to the inmates working in the shop. (Decl. of William Tardella, executed on June 5, 2007 ("Tardella Decl.") ¶¶ 10–12, 17–20). Tardella further states that jumpsuits and showers were provided to inmates, and that "[a]lthough they were not mandatory, all the inmates took advantage of them so that they did not have to shower back at their cells and the jumpsuits kept them clean while they worked in the auto body shop." (*Id.* at ¶ 20).

Patterson also discusses the safety procedures in the shop, testifying that safety instructions were given to inmates, that each inmate had his own mask, and that working in the spray booths was not dangerous because the inmates wore masks and because the booths were ventilated. (Decl. of Arthur Patterson, executed June 6, 2007 ("Patterson Decl.") ¶¶ 15, 18–21). He further states that representatives from the New York State Department of Labor visited the shop to assess compliance with regulations, and that the Superintendent and Assistant Superintendent of Industry at Green Haven visited the shop regularly, though he does not state in what time period these visits occurred, and whether these visits found any problems with the shop. (*Id.* at ¶¶ 16–17).

Plaintiff responds by asserting that defendants have not

produced any new evidence regarding the conditions of the auto body shop, and also submits the affidavit of Randolph Rossi, an inmate who also worked in the shop. Rossi testifies that the prisoners were "made to sign a document stating that [they] were informed of the safety precautions even though [they] were never formally required to attend or participate in any" training classes, and that they also were never given any instruction or told to read the "Material Data Sheets." (Aff. of Randolph Rossi, executed June 28, 2007 ("Rossi Aff.") ¶¶ 6–7). He also states that the inmates wore doctors' masks while working with toxic chemicals, that he was given a respirator mask but that the mask still let in fumes, and that the shop windows were closed in the wintertime to conserve heat in the shop, a claim that plaintiff also made in a previous affidavit. (*Id.* at ¶¶ 8–13; Jackson Aff. I ¶ 13). Finally, Rossi states that he did not recall ever seeing the Superintendent or Assistant Superintendent of Industry visit the shop. (Rossi Aff. ¶ 14).

The two declarations submitted by defendants add only a scintilla of additional evidence with regard to the auto body shop conditions, and defendants still do not meet their burden for summary judgment. The declarations repeat in large part the assertions made by Smith, Reilly, and Hennessey about the general safety procedures at the auto body shop with regard to ventilation and equipment, and the only new information they provide is the reference to the inmates' access to "Material Data Safety Sheets" and the visits from officials to determine compliance. Notably, neither Tardella nor Patterson profess any knowledge of plaintiff's work conditions in the auto body shop in particular, and Tardella specifically states, "I do not recall plaintiff Nahshon Jackson." (Tardella Decl. ¶ 21).[4]

Furthermore, both plaintiff's and Rossi's testimony directly contradict these statements about the general safety procedures in the auto body shop. Plaintiff testified, *inter alia*, that he was not properly trained to work in the shop despite signing the safety form, that he was supplied with *319 an inadequate mask while working with toxic chemicals, and that the fans and windows did not properly ventilate the shop. (Jackson Aff. I ¶¶ 12–14). Rossi repeats these assertions that the general safety procedures were not followed and were inadequate, as he testifies that the inmates were not informed about safety precautions or the Material Data Safety Sheets referred to by Tardella, that the masks they were given let in fumes, and that the windows were not always open to ventilate the rooms. (Rossi Aff. ¶¶ 6–8, 10–13). Additionally, in plaintiff's opposition to defendants' original summary-judgment motion, he submitted a written grievance form from another inmate, John Taylor, who complained that Reilly "deliberately failed to provide" Taylor with the necessary protective equipment while he was working in the auto body shop and that he was exposed to toxic chemicals as a result (Jackson Aff. I Ex. D), evidence that further supports plaintiff's claims that inmates were not given proper safety equipment and were not properly trained to handle toxic chemicals in the auto body shop. Thus there exists a genuine dispute of material fact between the parties as to the actual safety practices in the shop.

Defendants also assert that plaintiff's medical records "do not prove that [his alleged symptoms] were related to his work at the auto body shop." (Defs.' Mem. 13). To support this and other claims about plaintiff's medical conditions, defendants re-submit plaintiff's medical records, which they had submitted in support of their first motion, and offer the declaration of Tim Whelan, a Facility Health Services Director for DOCS who has not treated plaintiff. (Decl. of Tim Whelan, executed June 6, 2007 ("Whelan Decl.")). Aside from the fact that plaintiff is not required to "prove" his case in opposing a summary-judgment motion, the very parts of the medical records that defendants and Whelan cite contradict defendants' arguments on this point.

Plaintiff's medical records contain multiple notations that plaintiff complained about the conditions and fumes in the shop, including statements that his headaches got worse when he was in the shop, and that his headaches arose after a full day's work. (Whelan Decl. Ex. F ("Medical R.") 46, 47, 52, 53). Another entry details plaintiff's complaint that his feet had been exposed to chemicals while he was cleaning the auto body car paint room. (*Id.* at 44–45). Although defendants cite the entry in the medical records that day as indicating "no obvious distress" and "skin of both feet intact," these notations do not contradict plaintiff's claims that he was exposed to toxic chemicals or that he suffered from serious medical symptoms as a result of that exposure. In fact, plaintiff specifically testified in his deposition that the conditions in the shop caused headaches, nosebleed, and nausea. (Dep. 22–23, 26).

Defendants also argue that plaintiff has not established that the chemicals in the auto body shop posed an unreasonable risk of serious damage to his health. However, plaintiff also testified that he was constantly exposed to "[r]ed putty, primer, paint, fumes from vehicles, Bondo residue" (Dep. 19) and carbon monoxide and "the buffing of wax" (Jackson Aff. I ¶ 13) in the shop, that he was forced to wear a mask in the shop that had a warning label stating that it could cause sickness or death if it was used for industrial purposes (Dep. 21), that the toxicity of the materials he was handling was

confirmed by a prison official (*id.* at 25–26), and that once the shop had to be closed down because of the chemicals. (*Id.* at 31). Plaintiff also testified that he worked in the shop for seven hours a day for an extended period of time. (*Id.* at 37–38).

***320** Defendants do not proffer any testimony containing personal knowledge of plaintiff's specific work conditions, and also do not proffer evidence of the level of toxicity of the materials with which plaintiff worked. Thus a reasonable fact-finder could conclude, based on plaintiff's testimony about his prolonged exposure to the harmful effects of the materials and the inadequacy of the safety equipment, that plaintiff was exposed to levels of toxins and chemicals that posed an unreasonable risk of serious damage to his immediate or future health. *See, e.g., Helling,* 509 U.S. at 34, 113 S.Ct. 2475 (noting that inmates have been held to be "entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates.").

Therefore, the additional evidence proffered by defendants does not suffice to meet their burden to show an absence of dispute as to the material facts regarding the conditions in the auto body shop when plaintiff worked there or the risk that the toxic materials in the shop created.

ii. *Asbestos*

[11] Plaintiff asserts that he was exposed to asbestos four to five hours a day while he was at the "J–School," an area at Green Haven that housed the law library, inmate organizations, and the counseling and physical therapy units. (Dep. 35–44; Jackson Aff. 1 ¶ 9; Compl. ¶ 29). He was notified of the asbestos exposure through signs posted at the J–School as well as through prison officials and other prisoners, including prisoners who were doing asbestos abatement work at the J–School. (Dep. 38–40).

Defendants have not provided any evidence addressing plaintiff's asbestos claim in either their first motion for summary judgment or their supplemental filing. Their argument on their current motion regarding this claim states in full:

> Although Plaintiff alleges that he was exposed to asbestos while at Green Haven (Complaint ¶ 29), he does not allege in his Complaint that he suffered any specific injury as a result of the alleged exposure. Furthermore, his medical records do not contain any indication that he complained of asbestos exposure, or that he believed that any of his alleged ailments were the result of asbestos exposure.

(Defs.' Supp. Mem. 11–12).

As we have noted, however, the lack of proof of injury is not dispositive of this claim, as plaintiff need not show an actual or present injury in order to bring an Eighth Amendment claim. *See Farmer,* 511 U.S. at 837, 114 S.Ct. 1970. Further, the Second Circuit has held that asbestos exposure in prison can constitute a violation of the Eighth Amendment. *LaBounty v. Coughlin,* 137 F.3d 68, 74 (2d Cir.1998). As defendants fail to provide any evidence disputing plaintiff's claim that he was exposed to asbestos for four to five hours a day over an extended period of time or his claim that there is a risk to his health as a result of this exposure, summary judgment cannot be granted on this claim.

iii. *Plaintiff's Cell*

Plaintiff complains about the conditions in his cell, alleging that the ventilation system was clogged with bacteria and black particles, that there was inadequate heating and hot water, and that there was a sewage drainpipe in front of his cell that discharged a foul odor. (Dep. 44–47; Jackson Aff. 1 ¶¶ 7, 16). He asserts that he sustained headaches, dizziness, foul odor, and nosebleed from the bacteria in ***321** his cell. (Jackson Aff. 1 ¶ 16; Compl. ¶ 31).

Again, defendants offer no evidence regarding these claims in either their initial or their supplemental motion, and the only argument they make on this claim in support of their supplemental motion is that "there is no indication in the medical records that [plaintiff] complained of any of these ailments with regard to the ventilation system." (Defs.' Mem. 12 (citing Whelan Decl. ¶ 16)). However, the record shows at least one entry in the medical records stating "c/o diarrhea—intermittent. States foul odor from ventilation system in cell and has reported it to security." (Medical R. 25). Further, the medical records generally are rife with plaintiff's complaints of headaches, dizziness, and nosebleeds. (*See, e.g., id.* at 3, 8, 29, 3, 45–47, 53). Plaintiff also provided complaints from numerous inmates about headaches and other ailments resulting from poor ventilation in their cells in his opposition papers to defendants' original motion. (Jackson Aff. 1 Ex. B). Since defendants proffer no evidence with respect to plaintiff's complaints about his cell, and only misrepresent the record in their

supplemental briefing, we again recommend denial of summary judgment on this claim.

iv. *Drinking Water*

[12] Plaintiff also complains that the drinking water in his cell was "highly contaminated," and that he personally observed that the water had brown particles in it and left large amounts of rust in his sink. (Compl. ¶ 33; Dep. 47–48). He asserts that he suffers from "diarrhea, skin rashes, fatigue, and other illnesses," symptoms that emerged only after he drank the contaminated water, and that other inmates also complained after drinking the water. (Compl. ¶ 35; Dep. 49–52). In support of his opposition to defendants' original motion, plaintiff submitted written complaints from himself and at least ten other inmates mentioning the water quality and complaining of physical ailments resulting from consuming the water, including headaches, rashes, diarrhea, vomiting, and body pains. (Jackson Aff. I Ex. B).

In support of their supplemental motion, defendants resubmit the water inspection records they submitted in their original motion. The records are attached to a declaration from Jeff Richards, the Plant Superintendent at Green Haven, who states that the records are "true and correct copies of water records for water tested at Green Haven from 1995 to 1996 which I have reviewed" but then states in the same paragraph that "[a]lthough I believe these records are true and correct, I am unable to certify these records because the original water records from those dates no longer exist, as it is Green Haven policy to retain records for a maximum of five years." (Decl. of Jeff Richards ("Richards Decl.") ¶ 5 & Ex. G). Richards further states that he and his employees always drank the water at Green Haven, that occasionally there was discoloration in the water from increased water flow disturbing sediment, which is harmless because it "is always present in the water," and that "[t]here were no serious incidents with the sewage system/water treatment while Plaintiff was at Green Haven." (Richards Decl. ¶¶ 6–7, 9–10).

Defendants face the same problems on this claim with their supplemental motion as they did with their original motion. (*See* R & R 44 n. 10). The water inspection reports remain unauthenticated, as Richards specifically states that he is unable to certify them, and, more importantly, remain unexplained. It is still unclear how the water was tested, whether the water tested was from the same source as the water that was provided to plaintiff, *322 and how complete the submitted records are.[5] Moreover, the only additional evidence that defendants present in support of their supplemental motion on this claim is Richards' short declaration, but none of his statements show an absence of a genuine issue of material fact about the water quality. His statement that he and his employees drink the water at Green Haven is irrelevant, as he does not offer proof that they drank from the same water source as plaintiff, and also does not state what their physical conditions were after drinking the water. His statement that the increased sediment flow in the water "is not harmful, since it is something that is always present in the water" is unsupported by any evidence or explanation of what expertise he has or on what he bases this opinion.

In light of the evidence presented by plaintiff from the medical records, plaintiff's affidavits, and other inmates' complaints, there remains a triable issue as to the quality of the water and whether or not it posed a serious risk to plaintiff's health. Accordingly, summary judgment must be denied on this claim.

v. *Cigarette Smoke*

Plaintiff's final environmental claim is that he was exposed multiple times to cigarette smoke in a medical holding pen. (Compl. ¶¶ 36–39; Dep. 98–99). In their supplemental motion, defendants point to fact that plaintiff's medical record reflects that he once complained that the smoke bothered his eyes, but that the entry says plaintiff was "in no obvious distress." (Defs.' Mem. 12). Defendants do not appear to make any legal argument with regard to this claim.[6]

Defendants have provided no additional evidence on this claim, and we again recommend denial of summary judgment. The courts have held that exposure to cigarette smoke can constitute an Eighth Amendment violation. *Helling*, 509 U.S. at 35, 113 S.Ct. 2475; *Warren v. Keane*, 196 F.3d 330, 333 (2d Cir.1999). Insofar as defendants are arguing that plaintiff's medical records do not support a claim of present harm based on exposure to cigarette smoke, we again note that the Eighth Amendment protects against imminent dangers as well as actual injury. *Helling*, 509 U.S. at 34, 113 S.Ct. 2475.

C. *Substantial Risk of Serious Harm*

Defendants also make a blanket statement at the end of their memorandum that "[p]laintiff has not established that the level of any alleged toxic chemical, smoke, asbestos, or contaminated water posed an unreasonable risk of serious damage to his health," arguing that plaintiff's symptoms are those "of a cold or a flu, or eye strain, and are clearly not conditions of urgency that may produce death, degeneration or extreme pain." (Defs.' Mem. 13–14).

This argument is dishonest, as well as plainly frivolous. As mentioned, the Supreme Court has found that exposure to toxic and unsafe substances can constitute an unreasonable risk of serious danger to an inmate's health. *Helling*, 509 U.S. at 33–34, 113 S.Ct. 2475; *see also* *323 *Wright v. New York State Dep't of Corr. Servs.*, 2008 WL 5055660, at *10 (S.D.N.Y. Oct. 10, 2008) ("Exposure to unsafe levels of toxic substances, such as tobacco smoke or asbestos, may suffice as sufficiently dangerous conditions to satisfy the objective element of an Eighth Amendment claim."). Additionally, plaintiff's medical records for the relevant time period reflect frequent complaints about the numerous medical conditions he associates with his claims—such as headaches, dizziness, shortness of breath, coughing, difficulty breathing, diarrhea, and eyestrain. (Medical R. 3, 8, 22, 25, 29–30, 37, 39, 45–48, 50–53). The only evidence, medical or otherwise, that defendants submit to contradict plaintiff's claims about the potential danger of the environmental conditions of which he complains is Whelan's conclusory statement that "none of these factors posed an unreasonable risk to Mr. Jackson's health," and that "[i]t is clear that Mr. Jackson was not exposed to any of these agents at any level that could produce death, degeneration, or extreme pain or that posed an unreasonable risk of serious damage to his future health." (Whelan Decl. ¶¶ 35–36). However, Whelan does not explain how he has the personal knowledge to make such statements, as he does not claim to ever have worked at Green Haven, seen the auto body shop or other environments of which plaintiff complains, or met or treated plaintiff. Defendants' additional contention that plaintiff's symptoms are simply those of a cold or flu are unsupported by any medical opinion or proof.

Considering all the evidence presented by the parties, a reasonable fact-finder could find that plaintiff was exposed an unreasonable risk of serious harm from the environmental conditions of which he complains.

D. *Deliberate Indifference*

Defendants also assert in a conclusory fashion that "nothing in the record indicates that Defendants knew that Plaintiff faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable measure[s] to abate the risk." (Defs.' Mem. 14). As noted in our previous Report and Recommendation, defendants fail to carry their burden on a summary-judgment motion with such bare-bones statements without any reference to anything in the record that would demonstrate the absence of a triable issue. Summary-judgment on this issue should be denied. (*See* R & R 43–44).

IV. *Personal Involvement of Defendant Artuz*

Defendants argue that defendant Christopher Artuz was not personally involved in any of plaintiff's environmental claims, and therefore the claims against him should be dismissed. (Defs.' Mem. 7–9). In support of this aspect of their supplemental motion, they offer the declaration of Artuz, in which he discusses his responsibilities and the general process for handling inmate letters. (Decl. of Christopher P. Artuz dated June 6, 2007 ("Artuz Decl.") ¶¶ 3–5). He further states that the Green Haven staff does not have (1) "any written letters addressed to [him] for the period of 1995 and 1997" or (2) any grievances written by plaintiff between the same years, although he notes that the staff only retains grievances for four years plus the calendar year. (*Id.* at ¶¶ 6–7). He also states that he has no personal recollection of plaintiff. (*Id.* at ¶ 6).

Plaintiff alleges that Artuz was aware of the asbestos, poor ventilation in the cells, and the contaminated drinking water and its physical effects. (Compl.¶¶ 30, 32–35). In support of that allegation, he testified that he had filed grievances with Artuz about his exposure to cigarette smoke, ventilation in his cell, and contaminated drinking water, and that Artuz did not respond to these grievances. (Dep. 46, 48, 91–92; Compl. ¶¶ 40–41, 57–58).

*324 [13] "[P]ersonal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Farrell v. Burke*, 449 F.3d 470, 484 (2d Cir.2006) (citing *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994)). A supervisory official cannot be liable under the doctrine of *respondeat superior*. *See, e.g.*, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065 (2d Cir.1989). The requisite personal involvement may be shown by establishing one of five circumstances:

(1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir.1995); *Jean–Laurent v. Wilkerson,* 438 F.Supp.2d 318, 325 (S.D.N.Y.2006).

Based on plaintiff's assertions that Artuz received complaints from him and from a number of other inmates (Dep. 46, 48, 91–92; Compl. ¶¶ 40–41, 57–58; Jackson Aff. I Exs. B, D) and that Artuz was aware of the harmful environmental conditions, Artuz could be found to have been personally involved in the alleged violations under two of the *Colon* circumstances: (1) failure to remedy a wrong after being informed of the violation through a report or appeal, or (2) exhibition of deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. *See, e.g., Blyden v. Mancusi,* 186 F.3d 252, 264 (2d Cir.1999) (finding that supervisors may be personally involved in a deprivation of rights by learning of a violation and failing to remedy it).[7]

[14] The limited amount of information Artuz provides in his declaration is insufficient to meet his burden on a summary-judgment motion on this issue. Plaintiff has testified that he sent numerous grievances to Artuz that notified the Superintendent of the alleged ongoing constitutional violations. While Artuz states that he does not have any letters addressed to him or any record of grievances filed by *325 plaintiff, he also states that any such documents would not have been retained by Green Haven under its record-keeping policies. (Artuz Decl. ¶¶ 6–7).[8] Necessarily, there is a genuine issue of material fact as to whether Artuz received any grievances from plaintiff, and what, if anything, he did in response to those grievances.

More significantly, however, Artuz does not address in his declaration whether he had any knowledge or notice, from plaintiff or otherwise, of the alleged environmental problems. Based on the numerous inmate complaints about the problems that plaintiff has proffered as evidence, a reasonable trier of fact court find that Artuz knew of the ongoing constitutional violations and, as Superintendent, had the authority to correct the problems and failed to do so. *See Hall v. Leclaire,* 2007 WL 1470532, at *10 (S.D.N.Y. May 22, 2007), *adopted in relevant part,* 2007 WL 2815624 (S.D.N.Y. Sept. 28, 2007) ("An appropriate guiding principle" in determining whether an administrative action constitutes personal involvement "is that where a grievance alleges an ongoing constitutional violation, a supervisory defendant who reviews it is personally involved in that violation because he is confronted with a situation that he can remedy directly."). Thus whether or not Artuz was personally involved in the alleged constitutional violations remains a triable issue. Accordingly summary judgment on this claim should be denied.

CONCLUSION

For the reasons stated, we recommend that defendants' supplemental motion for summary judgment be denied in all respects.

Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable George B. Daniels, Room 410, 40 Centre Street, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Small v. Secretary of Health and Human Services,* 892 F.2d 15, 16 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

Dated: New York, New York.

August 6, 2009.

All Citations

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Footnotes

1 Plaintiff's other claims in his complaint are summarized in our Report and Recommendation on defendants' initial summary-judgment motion. (Report and Recommendation dated July 7, 2005 ("R & R") 2–9).

2 We note that even if the motion were granted, this case would still have to proceed to trial on plaintiff's failure-to-treat claims against defendant Lynn Forgit. (*See* R & R 75).

3 We assume familiarity with the evidence and analysis of these claims recounted in our prior Report and Recommendation. (*See* R & R 3–5, 35–46).

4 Tardella's statement that "all" of the inmates used the jumpsuits and showers despite their not being required (Tardella Aff. ¶ 20) does not reflect any personal knowledge of plaintiff's practices when he worked in the shop, and, regardless, contradicts plaintiff's testimony on this matter.

5 We note that the water inspection records come only from the years 1995 and 1996, and that plaintiff's claims cover a longer period of time, as his complaint was filed in 1997, and he testified in his deposition in 1998 that the water was still contaminated. (Dep. 47–49).

6 Defendants make an additional argument that although plaintiff claims that he does not smoke, he admitted in his deposition that he had purchased cigarettes. (Defs.' Mem. 12; Dep. 53). However, plaintiff also testified that he purchased the cigarettes for barter and not for personal consumption (Dep. 54), so there appears to be a question of fact as to whether or not plaintiff smoked. In short, defendants' argument on this point cannot justify summary judgment.

7 A question has arisen as to whether the traditional supervisory-liability test has been eviscerated by the recent Supreme Court decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). *See, e.g.,* Martin A. Schwartz, *Supreme Court Sets Standards For Civil Rights Complaints,* N.Y.L.J., Aug. 3, 2009, at 3, 7 (stating that the Court "jettisoned the very concept of supervisory liability"). We do not believe that it has done so in the circumstance of this case. The claims by Iqbal involved, *inter alia,* denial of equal protection or discrimination—legal theories that require proof of discriminatory intent. *Iqbal,* 129 S.Ct. at 1948 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540–541, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) and *Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). The Supreme Court held in *Iqbal* that even supervisors must be alleged and proven to have violated the plaintiff's underlying constitutional right to be held liable. *See id.* at 1949, 1952. Since the claims at issue in *Iqbal* involved discriminatory intent, the Court held that the plaintiff could not prevail by way of the traditional supervisory-liability test of deliberate indifference. *Id.* at 1949. In contrast, in this and many other prison-condition cases, the underlying constitutional right of the inmate is to be free of injurious deliberate indifference by their jailers. *See, e.g., Erickson v. Pardus,* 551 U.S. 89, 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); *Sledge v. Kooi,* 564 F.3d 105, 106 (2d Cir.2009). In these cases, then, deliberate indifference by supervisors to known injury-causing conditions should still trigger liability.

8 Since it is highly implausible that no letters were written to Artuz from 1995 to 1997, we assume that Green Haven follows a similar policy for letters as it does for grievances and had no longer retained any letters to Artuz from that period at the time defendants filed their supplemental motion.

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THREE AFFILIATED TRIBES

FORT BERTHOLD RESERVATION

MHA SUPREME COURT

NEW TOWN, NORTH DAKOTA

Terrance Fredericks and Carol Good Bear, Plaintiffs-Appellants, vs. Mark N. Fox, as Three Affiliated Tribes' Tribal Chairman, Cory Spotted Bear, as Three Affiliated Tribes' Vice-Chairman, Fred Fox, as Three Affiliated Tribes' Executive Secretary, Mervin Packineau, as Three Affiliated Tribes' Treasurer, Robert White, as Three Affiliated Tribes' Councilman, Sherry Turner-Lone Fight, as Three Affiliated Tribes' Councilwoman, Monica Mayer, as Three Affiliated Tribes' Councilwoman, and The Three Affiliated Tribes' Tribal Business Council, Defendants-Appellees.	Supreme Court Case No. AP-2025-001 Case No. CV-2024-0357 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on June 3, 2025, true and correct copies of the following document:

1. Plaintiff/Appellants' Response to Defendant/Appellees' Motion to Strike; and
2. Certificate of Service.

were filed with the Court and sent to the Court and Counsel for the Defendant/Appellees by U.S. Mail and electronic mail at the following addresses:

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Dated this 3rd day of June, 2025.

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