RECORD NO. 14-2738

In The
United States Court of Appeals
For The Third Circuit

CHARLES MACK,

Plaintiff – Appellant,

v.

JOHN YOST, Warden; TIM KUHN, Associate Warden; JEFF STEVENS, Trust Fund Officer, Sued in their Individual and Official Capcities; D. VESLOSKY, Correctional Officer; DOUG ROBERTS, Correctional Officer Sued in their individual capacities,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANT AND JOINT APPENDIX VOLUME I OF II (Pages 1 – 25)

Sean E. Andrussier
DUKE UNIVERSITY SCHOOL OF LAW
Box 90360
210 Science Drive
Durham, North Carolina 27708
(919) 613-7280

Counsel for Appellant

On the Brief:
John Bailey
Anne Showalter
Russell Taylor

Students, Duke University School of Law

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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INTRODUCTION

Plaintiff Charles Mack is a devout Muslim. He is incarcerated at a federal penitentiary. He brought this civil-rights action because prison officers engaged in anti-Muslim harassment and discrimination and retaliated against him.

This case was previously before this Court. In the earlier appeal, which involved the district court's screening order (per 28 U.S.C. § 1915A) dismissing Mack's complaint for failure to state a claim, this Court vacated and remanded for further proceedings. A44.[1] This Court held that the lower court had "fail[ed] to acknowledge material allegations, fail[ed] to apply the proper legal standards to those it d[id] acknowledge, and fail[ed] to address potentially cognizable claims." A47. On remand, the district court again dismissed the action for failure to state a claim. A21. But Mack's *pro se* pleading, liberally construed, does state valid claims, and so the judgment should be reversed.

STATEMENT OF JURISDICTION

In this action asserting federal claims against federal officials, the district court had jurisdiction under 28 U.S.C. § 1331. The district court dismissed the amended complaint with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief may be granted. A21. That order issued on October 24, 2013. A21. Mack then filed a motion to alter or

[1] We cite the Appendix contents as "A" followed by the page number.

amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure. A66. A Rule 59(e) motion is timely if filed within 28 days, Fed. R. Civ. P. 59(e), and it tolls the time for filing a notice of appeal, Fed. R. App. P. 4(a)(4)(A)(iv); *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010).

Mack's Rule 59(e) motion was timely under the prison-mailbox rule. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (deeming a prisoner's filing timely as of the date it was given to prison officials for mailing). With respect to Rule 59(e) motions, this Court has repeatedly presumed that the date on an inmate's motion is the date of delivery to the prison's mailbox—and thus the date of filing.[2] Mack's Rule 59(e) motion and his attached certificate were dated November 21, 2013, A71, A72, within the 28-day period, and his certification for that motion explicitly invoked the prison-mailbox rule, citing *Houston v. Lack*. A72. Nonetheless, we are filing, contemporaneously with this brief, a declaration by Mack attesting that he filed his Rule 59(e) motion on November 21, 2013. *Cf. United States v. Lynch*, 158 F.3d 195, 196 n.1 (3d Cir. 1998) (observing that, after this Court's Clerk notified the parties of a potential jurisdictional defect regarding the timeliness of a prisoner's notice of appeal, the prisoner-appellant, "[t]hrough his appellate

[2] *See, e.g.*, *United States v. Brown*, 527 F. App'x 94, 95 n.2 (3d Cir. 2013); *In re Riley*, 227 F. App'x 142, 143 n.1 (3d Cir. 2007) (per curiam); *In re Steele*, 251 F. App'x 772, 772 n.2 (3d Cir. 2007) (per curiam); *Askew v. Jones*, 160 F. App'x 140, 142 n.3 (3d Cir. 2005) (per curiam).

counsel, . . . submitted to the Court a notarized statement verifying that he deposited the notice of appeal to the prison mail system" within the deadline).[3]

Because Mack timely filed his Rule 59(e) motion, the time to file an appeal from the underlying dismissal order ran from the date the district court denied the Rule 59(e) motion, *see* Fed. R. App. P. 4(a)(4)(A)(iv), which was April 3, 2014, A25. Mack timely filed a notice of appeal, which was filed on the docket on May 13, 2014. A1; *see* Fed. R. App. P. 4(a)(1)(B)(iv) (providing a 60-day appeal period when a defendant is a federal officer or employee).

As this appeal is from a final judgment, appellate jurisdiction rests on 28 U.S.C. § 1291. That Mack's *pro se* notice of appeal identified only the order denying his Rule 59(e) motion does not deprive this Court of appellate jurisdiction over the underlying dismissal order. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 225 n.6 (3d Cir. 2007) (calling the failure to reference the underlying dismissal a mere "technical inadequacy"); *cf. State Farm Mutual Auto. Ins. Co. v. Palmer*, 350 U.S. 944, 944 (1956) (per curiam) (reversing the Ninth Circuit's dismissal of an appeal for which the notice of appeal specified the denial of a new-trial motion but not the underlying judgment). This Court has repeatedly

[3] Defendants did not object to the timeliness of the motion. Though the district court said the motion was not timely filed, the court mentioned only the date on which the motion was literally filed on the docket by the clerk (Monday, November 25, 2013). A25. The court did not mention the prison-mailbox rule or the date on the motion and accompanying certificate (November 21, 2013).

said that "[a] timely appeal from a denial of a Rule 59 motion to alter or amend brings up the underlying judgment for review." *Wiest v. Lynch*, 710 F.3d 121, 128 n.3 (3d Cir. 2013) (citations and internal quotation marks omitted); *see also Borrero v. City of Chicago*, 456 F.3d 698, 700 (7th Cir. 2006) ("The two orders—the judgment and the denial of the motion to change it—merge. . . . [T]he court of appeals will construe an appeal from the denial (should the appellant's notice of appeal mistakenly cite only the denial) as an appeal from the judgment.").

In any case, this Court has jurisdiction to review any underlying order not specified in a notice of appeal so long as: "'(1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues.'" *Wiest*, 710 F.3d at 127 (citation omitted). Here, the Rule 59 order and dismissal order are intertwined, Mack clearly intends to appeal the judgment dismissing his claims, and Defendants have a full opportunity to brief the issues. *See id.* at 127–28 (holding that the plaintiff's intent to appeal the dismissal order was implied because that order was "intertwined" with the Rule 59 order, the plaintiff's "intention was apparent in his principal brief," and the appellee "had a full opportunity to brief the corresponding issues"); *LeBoon*, 503 F.3d at 225 & n.6 (exercising jurisdiction over the underlying summary-judgment order despite the notice of appeal designating only the order denying a motion for reconsideration).

STATEMENT OF THE ISSUES

1. Did the district court err in holding that Mack failed to state a claim for retaliation under the First Amendment when he alleged he was removed from his commissary work assignment for complaining to an official about subordinate officers' anti-Muslim harassment and animus? In particular, does an inmate's legitimate grievance lose constitutional protection when communicated orally and informally? (Plaintiff's pleadings: A33, A36–42, A56–60. Rule 12(b)(6) order: A11–14. Rule 59(e) order: A24.)

2. Did Mack, a devout Muslim, plead valid claims under the Religious Freedom Restoration Act, the Free Exercise Clause, and the Constitution's equal protection guarantee when he alleged that officials targeted and harassed him because of his faith and ultimately removed him from his prison job? (Plaintiff's pleadings: A33, A36–42, A56–60. Rule 12(b)(6) order: A10–11, A17–20. Rule 59(e) order: A23–24.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case was previously before this Court on appeal from the district court's earlier order dismissing the case for failure to state a claim. This Court vacated the dismissal order and remanded. *Mack v. Yost*, 427 F. App'x 70 (3d Cir. 2011) (per curiam) (appearing at A44 of the Appendix). Counsel is not aware of any other case or proceeding in any way related to this case.

STATEMENT OF THE CASE

I. Factual Background[4]

A. Anti-Muslim Harassment

"Plaintiff Charles Mack is and has been a devoted practicing Muslim." A36(¶16). He is incarcerated at the Federal Correctional Institution in Loretto, Pennsylvania ("FCI Loretto"). A56(¶1).

Mack worked for pay in the prison's commissary. A37(¶20); A57(¶¶8,11). His job entailed stocking shelves, collecting commissary lists from other inmates, filling orders, and cleaning the commissary. A36–37(¶18); A57(¶¶8–9). Mack complied with the prison's rules and regulations, and was at all times respectful to the commissary's correctional staff and inmate workers. A37(¶19); A57(¶10).

Defendants Roberts and Venslosky were correctional officers assigned as staff foremen at the commissary, where they were responsible for the inmates' safety and security. A36(¶¶13–14); A57(¶¶5–6). In October 2009, while Mack was working in the commissary, Roberts "walked up behind [Mack] and forcefully slapped [him on] . . . his back," A57(¶12), with "a high velocity and forceful swing," A38(¶25). The blow caused "sharp pain[]." A38(¶25); *see* A57(¶12).

[4] Unless otherwise noted, these allegations come from Mack's original complaint (A33–43) and amended complaint (A56–61). The amended complaint largely tracks the original, and we cite both in most instances. The district court noted that Mack misspelled Stephens as "Stevens" and Venslosky as "Veslosky." A4.

Roberts kept his hand on Mack "in a threatening and harmful manner." A38(¶26); *see* A58(¶13). Surprised by the assault, *see* A38(¶27), Mack asked Roberts why he had struck him, and Roberts remarked, "Do you have a problem with what I did?" A38(¶27); A58(¶14). When Mack said yes, Roberts replied, "You'll be looking for another job soon!" A38(¶27); A58(¶14).

Mack did not realize, however, that Roberts had slapped onto Mack's back a sticker reading, "I LOVE BACON." A39(¶31); A58(¶16). As Roberts was aware, Mack is a practicing Muslim whose religion forbids consuming and handling pork products. A36(¶16); A37(¶21); A39(¶32); A58(¶¶16–17); A60(¶31).[5]

This assault occurred in front of other inmates working in the commissary. A38(¶28); A58(¶15). Venslosky joined them in laughing at Mack for unwittingly displaying a message that ridiculed his religious beliefs. A38(¶28); A58(¶15). With his back aching, Mack resumed his duties, unaware of the sticker, and, throughout the workday, Roberts, Venslosky, and the inmates working in the commissary laughed or snickered at Mack as he passed by. A38(¶29); A58(¶16). It was not until after Mack finished work that another inmate told him he was wearing an "I LOVE BACON" sticker. A38–39(¶¶30–31); A58(¶16). The next workday, Mack asked Roberts why he had stamped that message on Mack's back;

[5] *See Williams v. Bitner*, 455 F.3d 186, 187 (3d Cir. 2006) (quoting the Koran regarding this dietary law).

Roberts replied, "Why? Do you have a problem with that?" and declared, "You'll be looking for another job soon!" A39(¶32); A58(¶17).

When Mack returned to work at the commissary about two days later, Roberts looked directly at Mack and exclaimed loudly, "There's no good Muslim, except a dead Muslim!" A39(¶33); A58(¶18). Roberts made the "dead Muslim" statement in the presence of other inmate workers and an amused Venslosky. A39(¶33–34); A58(¶18).

Worried that other inmates would interpret the officers' conduct as endorsing anti-Muslim harassment, Mack feared that his "well being [was] in jeopardy" at the commissary. A39–40(¶¶35–36); A58(¶20). Mack "continued his work assignment very carefully and nervously[,] not knowing whether an inmate commissary worker may act out on Defendant Roberts['s] statement and attempt to physically harm [Mack] for being a Muslim." A39(¶35); *see* A58(¶20). Although the officers did not forbid Mack from praying, A60(¶¶31–33), their hostile conduct caused him to refrain from prayer while at the commissary. District Ct. Docket No. 42 at 14 (Pl.'s Mem. in Opp'n 14) (Mack asserting that Defendants "created a threatening [and] hostile environment, that literally caused plaintiff to change his behavior in that plaintiff would no longer pray in that area").[6]

[6] As explained below, *see* note 15, *infra*, practicing Muslims must pray five times a day, and religious doctrine dictates the timing, duration, and physical movements for this ritual.

B. Retaliation

Seeking to redress his grievance about the officers' anti-Muslim behavior and attitude, Mack spoke directly to their supervisor, Defendant Jeff Stephens, who was the prison's Trust Fund Supervisor. A35–36(¶12), A40(¶¶36–37); A57(¶4), A58(¶21). Stephens said he would "look into it." A40(¶37); A58(¶21). About a week later, Venslosky notified Mack that he (Mack) was fired from his work assignment, allegedly for bringing in other inmates' commissary lists. A40(¶38); A58–59(¶22). Mack replied that this was untrue, and that he was being terminated because he had complained to Stephens about the officers' anti-Muslim misconduct. A40(¶39); A59(¶23). Venslosky did not respond. A40(¶40); A59(¶23). Convinced that Venslosky's justification was a pretext, Mack again spoke to Stephens, who said he would "look into it." A40(¶¶41–42); A59(¶24).

Receiving no response from Stephens, Mack completed a request-to-staff form requesting that Stephens provide in writing the reason for Mack's removal from his commissary position. A40(¶¶42–43); A59(¶¶24–25). Stephens replied with the reason supplied by Venslosky: "[I]nmate was caught bringing slips in for inmates." A41(¶44); A59(¶26). Mack then spoke to the warden, John Yost, about the matter, and Yost replied, "What do you expect me to do?" A41(¶45–46); A59(¶¶27–28). Mack turned to the formal administrative grievance process, to no avail. A34–35(¶¶3–8); A59(¶29).

II. This Court Vacated The Earlier Dismissal Of Mack's Complaint.

On October 19, 2010, Mack filed a *pro se* complaint in the U.S. District Court for the Western District of Pennsylvania against Roberts, Venslosky, Stephens, Yost, and associate warden Timothy Kuhn. A33. Mack alleged discrimination against his Muslim beliefs, "religious targeting," and retaliation. A33–42. Proceeding under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), Mack invoked equal protection and the First Amendment (including the Free Exercise Clause), as well as the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 *et seq*. A33, A42. A magistrate judge screened Mack's complaint under 28 U.S.C. § 1915A and recommended dismissal for failure to state a claim, *see* District Ct. Docket Entry No. 3, and the district court adopted that recommendation over Mack's objections, *see* District Ct. Docket Nos. 4, 7, and 8.

On appeal, this Court vacated the dismissal order. A44. This Court first addressed Mack's retaliation claim. A47. The Court recognized that "'[a] prisoner alleging retaliation must show (1) constitutionally protected conduct, (2) an adverse action by prison officials sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the exercise of his constitutional rights and the adverse action taken against him.'" A47

(citation omitted). The Court held that "Mack's allegations regarding all three elements are sufficient to proceed." A47.

As for the first element (protected conduct), this Court framed the question as whether Mack engaged in protected conduct by complaining to Stephens about anti-Muslim harassment. A47–48. Observing that "certain informal, oral complaints to prison personnel have been held to constitute protected activity," the Court said that the district court on remand "should consider this issue in the first instance and, if it determines that Mack's complaint is deficient in this regard, provide him with leave to amend." A48.

Regarding the second element (adverse action), this Court concluded that "Mack has sufficiently alleged adverse action in the form of loss of employment," noting that Third Circuit precedent "expressly recognized that the loss of employment opportunities may qualify." A48 (citation omitted). As for the third element (causation), the Court held that "Mack has sufficiently alleged a causal connection between his complaint to the commissary supervisor and the loss of his job." A48. Mack was not required to allege that officials would not have taken the same action regardless of protected conduct; such "reasoning both misreads Mack's claim and confuses his obligation at the pleading stage with the ultimate burden of proof." A49. Mack's pleading burden, this Court explained, was "merely to state a prima facie case by alleging that his protected conduct was a

'substantial or motivating factor' for the loss of his job." A49 (citation omitted). "Mack clearly has done so." A49.

Next, this Court ruled that Mack's allegations about being mistreated for his religious affiliation were sufficient to proceed or, at the very least, to let him amend his complaint. A49. "Mack expressly asserted that defendants violated his First Amendment right to practice as a Muslim, and his allegations clearly invite inquiry into that issue." A50. The Court cited Free Exercise Clause precedent for the proposition that a "plaintiff asserting [a] free exercise claim on the basis of intentional targeting of religious exercise need not show 'substantial burden' because '[a]pplying such a burden test . . . would make petty harassment of religious . . . exercise immune from the protection of the First Amendment.'" A51 (citation omitted). This Court also faulted the lower court for failing to "address whether Mack's allegations state, or by amendment could state, an independent retaliation claim based on the exercise of his religion," adding that the court did "not appear to have recognized that Mack's allegations implicate his First Amendment religious rights at all." A51.

Upon vacating the dismissal order, this Court instructed the district court to "reconsider its ruling in accordance with this opinion and, if it again concludes that Mack's complaint fails to state a claim for any reason, provide him with an opportunity to amend or explain why the amendment would be futile." A51.

III. Proceedings On Remand

The district court responded to this Court's mandate with an order informing Mack that he should amend his complaint to provide a section labeled "Constitutionally Protected Conduct" to identify the conduct for which Defendants retaliated against him. A53. The order also provided that Mack could amend his complaint to identify or clarify his claims for mistreatment on the basis of religion. A54. Mack responded with a *pro se* amended complaint, filed May 4, 2012, which largely tracked his original complaint. A56.

Defendants moved to dismiss.[7] A63. Mack filed a brief in opposition. District Ct. Docket No. 42. On October 24, 2013, the district court granted the Rule 12(b)(6) motion, holding that Mack failed to state a claim on which relief could be granted. A3 (opinion); A21 (order dismissing action with prejudice).

The district court first ruled that Mack did not state a valid equal protection claim because he "has not identified any similarly situated individual whom prison officials treated differently." A11. The court next addressed retaliation, ruling that "an informal oral complaint to prison officials" is not protected by the First Amendment, and, therefore, that Mack's oral complaint to Stephens was not constitutionally protected conduct. A11–14.

[7] Defendants moved alternatively for summary judgment, but the court ruled that converting the motion into a summary judgment motion would be inappropriate as Mack was proceeding *pro se* and conversion would require notice. A7 n.3.

Regarding religious harassment, the district court construed Mack's RLUIPA claim as a claim under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, because RLUIPA does not apply to federal prisons; but the court ruled that Mack had not stated an actionable RFRA claim because, the court said, he had not sufficiently established that his religious exercise was substantially burdened. A17–18. Finally, the court held that Mack did not state an actionable claim under the Free Exercise Clause. A19–20.

Mack moved under Rule 59(e) to alter or amend the judgment. A66. The district court denied that motion on April 3, 2014. A25.

Mack appealed, and on August 5, 2015, this Court appointed the undersigned counsel to represent Mack *pro bono*. Without foreclosing other arguments, this Court directed the parties "to address whether the oral complaint on which appellant bases his retaliation claim constitutes activity that is protected under the First Amendment. *See*, *e.g.*, *Holzemer v. City of Memphis*, 621 F.3d 512, 516, 521–23 (6th Cir. 2010); *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006)." ECF No. 13.

SUMMARY OF ARGUMENT

I. Mack has stated a valid retaliation claim under the First Amendment by alleging he was removed from his paid work assignment in the prison commissary for complaining about correctional officers' anti-Muslim animus and harassment. Mack engaged conduct protected by the First Amendment when he spoke directly to an official about the officers' misconduct, which implicated the BOP's policies against religious-affiliation discrimination and disparagement. The First Amendment protects complaints directed to prison officials.

The district court erred in holding, as a matter of law, that an inmate's legitimate grievance loses constitutional protection when communicated orally and informally. Nothing in the First Amendment compels such formalism. The Petition Clause protects formal and informal petitions alike, and indeed the Supreme Court has said that the right is not limited to petitions lodged under formal procedures. Carving out oral petitions from the First Amendment's protection could not be reconciled with the right's purpose, and permitting retaliation simply because a complaint was not in a certain form would be contrary to public policy. Moreover, insofar as inmates were encouraged to communicate their concerns orally to prison personnel in the manner that Mack did—a factual matter that cannot properly be resolved at this stage—giving officials a free pass to retaliate would make no sense.

II. Mack has stated a claim under RFRA by sufficiently alleging a substantial burden on his religious exercise. In the presence of other inmates, the correctional officers who supervised Mack in the prison commissary targeted Mack because of his religion, with one officer assaulting Mack, demeaning his Muslim faith, exclaiming that the only good Muslim is a dead Muslim, and declaring that Mack would soon be looking for another job. Mack has alleged that this harassment and intimidation left him fearing for his safety at the commissary and induced him to refrain from a daily religious prayer ritual.

Mack has also stated a claim under the Free Exercise Clause for the intentional anti-Muslim targeting by government officers. In dismissing Mack's Free Exercise claim, the district court essentially required an affirmative denial of religious exercise, like an order prohibiting Mack from praying. But this reasoning ignores precedent on indirect coercion and would render harassment of religious exercise immune from the protection of the First Amendment.

III. Mack has stated an equal protection claim. Mack's allegations, construed liberally with all reasonably inferences in his favor, support a plausible inference that disapproval of his religious beliefs also played a role in his removal from his commissary position. Shortly after Roberts targeted Mack for his religious beliefs in the presence of Venslosky, Mack was fired on the basis of a pretextual justification supplied by Venslosky.

STANDARD OF REVIEW

"[This Court's] review of a district court's dismissal of a complaint for failure to state a claim is plenary." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 83 (3d Cir. 2011). "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims lack facial plausibility." *Id.* at 84. Moreover, "[a] document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal quotation marks and citations omitted); *accord Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009).

Regarding a Rule 59(e) order, "although the appropriate standard of review for a motion to reconsider is generally abuse of discretion, if the district court's denial was based upon the interpretation or application of a legal precept, then review of the district court's decision is plenary." *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986); *accord Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 673 (3d Cir. 1999). Thus, when legal conclusions or standards are at issue, "the standards of review for an underlying dismissal order and for the denial of a motion for reconsideration of the dismissal order are functionally equivalent, because [this Court] exercise[s] plenary review

of the dismissal order as well as of the legal questions in the denial of reconsideration." *Wiest*, 710 F.3d at 128. In such a case, appellate "review is plenary regardless of whether [this Court] review[s] the District Court's application of the standard in its initial dismissal Order or its subsequent Order denying reconsideration," *id.*, and so the Court need "not analyze [the orders] separately," *Koren v. Noonan*, 586 F. App'x 885, 887 n.2 (3d Cir. 2014).

ARGUMENT

"Religious discrimination, by its very nature, has long been thought odious to a free people whose institutions are founded upon the doctrine of equality." *Hassan v. City of New York*, 804 F.3d 277, 302 (3d Cir. 2015) (citations, internal quotation marks, and alteration omitted). "The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). After all, religious affiliation is part of one's identity. *See Hassan*, 804 F.3d at 301–02.

This Court recently noted our Nation's history of religious discrimination and that "the battle against religious prejudice continues." *Id.* at 303–04. "In light of this history, distinctions between citizens on religious grounds pose a particularly acute 'danger of stigma and stirred animosities.'" *Id.* at 304 (citation omitted). American Muslims have confronted this danger. *See* USA PATRIOT

Act of 2001, Pub. L. 107–56, § 102(a)(2), 115 Stat. 272, 276 (2002) ("The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001, attacks against the United States should be and are condemned by all Americans who value freedom.").

The Federal Bureau of Prisons (BOP) has tried to address equality for religious groups. The BOP has promulgated regulations conveying that "staff shall not discriminate against inmates on the basis of . . . religion," 28 C.F.R. § 551.90, and that "[n]o one may disparage the religious beliefs of an inmate, nor . . . harass an inmate to change religious affiliation," 28 C.F.R. § 548.15. Unfortunately, however, Mack's case shows that not all correctional officers live up to these ideals. Shortly after Mack reported to a supervisor that correctional officers were engaging in anti-Muslim harassment, he suffered reprisal: Mack was removed from his paid work assignment on the basis of a pretextual charge.

I. Mack Has Stated A First Amendment Retaliation Claim.

An inmate states a First Amendment retaliation claim by alleging that (1) he engaged in constitutionally protected conduct, (2) he suffered an adverse action by prison officials sufficient to deter a person of ordinary firmness from exercising his rights, and (3) his constitutionally protected conduct was a substantial or motivating factor behind the adverse action. *See Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001). When an inmate pleads those three elements, the burden shifts

to the defendants to prove they "would have made the same decision absent the protected conduct for reasons reasonably related to a legitimate penological interest." *Id.* at 334. Mack has sufficiently pleaded all three elements.

A. Mack Engaged In Protected Conduct When He Reported Government Misconduct To A Supervisory Prison Official.

In the presence of other inmate workers, correctional officers harassed Mack for his Muslim beliefs, with an officer going so far as to exclaim that "there's no good Muslim, except a dead Muslim!" A39 (¶33). Mack attempted to redress his grievance by speaking directly to Stephens. Mack's grievance concerned core BOP policies against religious-affiliation discrimination and disparagement. *See* 28 C.F.R. §§ 551.90, 548.15.

By presenting his grievance to Stephens, Mack engaged in protected conduct. The Petition Clause guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.[8] This right "is generally concerned with expression directed to the government seeking redress of a grievance," *Guarnieri*, 131 S. Ct. at 2495, and is "among the most precious of the

[8] Courts have also invoked the First Amendment's Free Speech Clause when evaluating inmate claims alleging retaliation for having filed grievances complaining about prison conditions. *See Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008) (involving letter to assistant warden); *cf. Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011) (observing that "[a]lthough this case proceeds under the Petition Clause, [Plaintiff] just as easily could have alleged [retaliation] for the speech contained within his grievances").

liberties safeguarded by the Bill of Rights," *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). Historically the right to petition was a vital means by which the unrepresented could seek redress and preserve other rights. *See Guarnieri*, 131 S. Ct. at 2499–500 (observing the importance of petitioning for "groups excluded from the franchise"); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 153 (1986) ("[U]nrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented themselves and voiced grievances through petitions.") (footnotes omitted).

The Petition Clause embraces a broad range of communications, *see McDonald v. Smith*, 472 U.S. 479, 488 n.2 (1985) (Brennan, J., concurring), and "encompasses formal and informal complaints," *see Arneault v. O'Toole*, 513 F. App'x 195, 198 n.2 (3d Cir. 2013). "[T]he right to petition is not limited to petitions lodged under formal procedures." *Guarnieri*, 131 S. Ct. at 2498. This Court, for example, has held that a plaintiff's petitioning was protected when it consisted of taping a handwritten note on the front door of a local police department requesting that a particular officer stop "picking on" his family; he "had clearly established rights to petition the government in the manner that he did and to be free of malicious prosecution for that exercise." *Losch v. Borough of Parkesburg*, 736 F.2d 903, 906, 910 (3d Cir. 1984); *see also Holzemer v. City of*

Memphis, 621 F.3d 512, 516, 521–23 (6th Cir. 2010) (holding that a proprietor's informal, happenstance conversation with a councilman requesting assistance about a local regulation was constitutionally protected "petitioning," and "find[ing] no constitutional distinction between an oral and written petition for redress" under those circumstances).

Prisoners have the right to petition for redress of grievances. *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam); A12. The right protects petitions directed to prison authorities. *See Pearson v. Welborn*, 471 F.3d 732, 741, 745 (7th Cir. 2006) (upholding judgment for inmate on retaliation claim based on inmate's oral complaints to prison staff). And so, "'a prison official may not retaliate against . . . an inmate . . . for complaining to a supervisor about a guard's misconduct.'" *Hart v. Hairston*, 343 F.3d 762, 764 (5th Cir. 2003) (citations omitted).

In dismissing Mack's claim, the district court held, as a matter of law, that an inmate's informal oral complaint to prison personnel is unprotected from retaliation. *See* A12–14, A24. But the court cited no authority from the Supreme Court, this Court, or any other circuit holding that legitimate grievances have no First Amendment protection if they are spoken. "Nothing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form" or that an inmate's "legitimate complaints

lose their protected status simply because they are spoken." *Pearson*, 471 F.3d at 741 (holding that inmate's oral complaints to prison staff were protected).[9]

Carving out oral complaints from the First Amendment's protection could not be reconciled with the Petition Clause's purpose. That purpose is to facilitate individuals' expression of their "concerns to their government" and to "request[] action by the government to address those concerns." *Guarnieri*, 131 S. Ct. at 2495. Given that purpose, the form of expression (oral versus written, or an oral grievance as a precursor to a written one) does not matter.

Indeed, permitting retaliation when a complaint is not in a certain form would inhibit legitimate complaints, contrary to public policy. In other antiretaliation contexts, public policy counsels *in favor* of protecting oral complaints, rather than leaving complainants exposed to retaliation simply because they chose to speak before or in lieu of putting their concerns in writing. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011). At issue in *Kasten* was the Fair Labor Standards Act's antiretaliation provision, which

[9] The district court cited another district court's dictum that "case law can be read to suggest" that First Amendment protection is "limited to [grievances filed] under state administrative law, such as sending a complaint to a state bureau of prisons." A14 (quoting *Bowman v. City of Middletown*, 91 F. Supp. 2d 644, 664 (S.D.N.Y. 2000)). But that dictum was not supported by the four cases cited by the *Bowman* court. *See Bowman*, 91 F. Supp. 2d at 664. None of those cases discussed the scope of protected conduct; that they happened to involve formal grievances does not mean that informal complaints are unprotected. Indeed, one of the cases was from the Seventh Circuit, which in another case upheld a retaliation judgment based on an inmate's oral intraprison complaints. *See Pearson*, 471 F.3d at 741.

makes it unlawful for an employer to take adverse action against an employee "'because such employee has *filed any complaint*.'" *Id.* at 4 (quoting 29 U.S.C. § 215(a)(3)) (emphasis added). The employer in *Kasten* argued that an oral complaint is not protected conduct under that provision. *Id.* at 6. The Supreme Court rejected that theory, holding that antiretaliation protection is not limited to written complaints. *Id.* at 4, 17. In reaching that conclusion, the Court relied heavily on the purpose of antiretaliation protection to encourage complaints. *See id.* at 11–14. Limiting protection to written complaints would inhibit legitimate complaints. *See id.* at 11–12 (discussing the illiterate). And it would remove needed flexibility from agencies that might otherwise welcome oral complaints (e.g., "hotlines, interviews, or other oral methods of receiving complaints"), while "discourag[ing] the use of desirable informal workplace grievance procedures to secure compliance with the Act." *Id.* at 12–13.

Notably, moreover, the Supreme Court in *Kasten* was not swayed by the employer's argument that a writing requirement was warranted to prevent factual disputes and post hoc fabrication. *See* Br. for Respondent 46–47, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011). That did not justify excluding oral complaints from protection against retaliation. While the Court acknowledged that "a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an

assertion of rights protected by the statute and a call for their protection," the Court observed that this standard could be met "by oral complaints, as well as by written ones." 563 U.S. at 14.

Likewise, a concern about fabrication does not justify a categorical rule stripping legitimate grievances of First Amendment protection simply because they are communicated informally or orally.[10]

For these reasons, the Seventh Circuit was right in holding that a prisoner's oral complaints to prison staff about prison conditions were not unprotected merely because they were not formalized in a written grievance. *Pearson*, 471 F.3d at 740–41. In *Pearson*, the plaintiff, Pearson, had complained to prison personnel about a lack of yard time and the shackling of inmates to one another during group therapy; in response, prison personnel allegedly retaliated by issuing a disciplinary ticket based on what Pearson claimed was a pretextual charge. *Id.* at 735–36. In attacking the judgment awarded to Pearson after a jury trial, a defendant argued on appeal that, although "as a general proposition . . . a prisoner's grievances about prison conditions are protected, . . . the right does not extend to *oral* complaints about prison conditions." *Id.* at 740 (emphasis in original) (citation omitted). The

[10] The district court cited four cases for the proposition that inmate retaliation claims should be viewed skeptically (in two of the cases the inmates prevailed on appeal). A13–14. But the courts in those cases were not speaking to the scope of protected conduct; the cases did not involve oral complaints.

Seventh Circuit disagreed. The court refused to read the formal grievance process into the First Amendment and was "unconvinced that the form of expression—i.e., oral versus written—dictates whether constitutional protection attaches." *Id.* at 741. The court "decline[d] to hold that legitimate complaints lose their protected status simply because they are spoken" or fail to "take[] a specific form." *Id.* The court observed that "although certain types of 'petitioning' would be obviously inconsistent with imprisonment (marches or group protests, for example), Pearson's oral complaints [did] not fall into that category." *Id.*

Pearson reveals an additional—and significant—reason why disposing of Mack's claim at the pleading stage is particularly unwarranted. In rejecting the notion that the form of expression—oral versus written—dictates the scope of constitutional protection, the Seventh Circuit made a pragmatic point about the evidence in that case. *See id.* Pearson testified that when he first arrived at the prison unit, a security officer told him and other inmates that they should let that officer or another staff member (who was also a defendant) know if the inmates had "any problems, complaints, or suggestions." *Id.* Accordingly, the court observed, it was "possible that [those] prisoners eschewed the formal grievance process *precisely because prison staff welcomed direct complaints*." *Id.* (emphasis added). "To then hold that those staff have a free pass to retaliate on the basis of such complaints . . . makes no sense." *Id.*

Likewise, in Mack's case, prison officials may have encouraged inmates to communicate their concerns orally to prison personnel in the manner that Mack did. For one thing, the BOP apparently has a policy of encouraging inmates to voice their concerns informally and orally. *See* U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement No. 5509.04: Informal Contact Between Institution Administrators and Inmates, at 1 (1998).[11] That policy is designed to encourage "[r]egular opportunities for inmates to have informal access to, and interaction with, administrative staff." *Id.* The policy anticipates regular and informal communications in public areas, including work areas; and the policy cross-references the BOP's *written informal-resolution process*, which uses a request-to-staff form. *Id.* Significantly, the policy recognizes that "inmates may feel uncomfortable in a more formal interview setting or may not want to use established procedures for obtaining an interview with institution administrators." *Id.*[12] This suggests the BOP may welcome inmates voicing concerns to staff.

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[11] *See* https://www.bop.gov/PublicInfo/execute/policysearch?todo=query#. Courts have taken judicial notice of BOP program statements. *See Davila v. Gladden*, 777 F.3d 1198, 1207 n.3 (11th Cir.), *cert. denied sub nom. Davila v. Haynes*, 136 S. Ct. 78 (2015); *United States v. Thornton*, 511 F.3d 1221, 1229 n.5 (9th Cir. 2008); *Anotelli v. Ralston*, 609 F.2d 340, 341 n.1 (8th Cir. 1979).

[12] That is a rational concern. Research shows that "[i]nmates' fear of retaliation deters them from filing grievances." James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. Mich. J.L. Reform 611, 614 (2009). A study of inmates in New York found that "'the level of actual retaliation, as well as the

Additionally, the BOP's regulation on informal grievance resolution flexibly allows for local variation. *See* 28 C.F.R. § 542.13 ("Each Warden shall establish procedures to allow for the informal resolution of inmate complaints."). At the pleading stage, the district court could not know if Mack's prison had procedures welcoming or encouraging oral complaints like his complaint to Stephens. In fact—and we cite this only to convey the impropriety of dismissing a *pro se* pleading based on untested assumptions—FCI Loretto's inmate handbook (which is publicly posted on the BOP's website) informs inmates that "Executive Staff and Department Heads *regularly stand mainline at the lunch meal and [inmates] are encouraged to bring legitimate concerns to their attention*." U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Loretto Inmate Admission and Orientation Handbook, at 14 (2015) (emphasis added).[13] This may explain why Stephens replied to Mack, "I'll look into it" (A58(¶21)), rather than, "Submit something in writing." Insofar as FCI Loretto staff welcomed oral complaints, presumably they deemed that practice to be consistent with legitimate penological interests. Giving them "a free

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perception of likely retaliation among . . . inmates, is unacceptably high and constitutes the single most important and difficult obstacle to inmates' use of the [grievance] system.'" *Id.* (footnote and citation omitted). In another survey, this one of prison supervisors, 60% "responded that a 'substantial number of inmates' do not file grievances despite having legitimate 'issues,' with fear of retaliation coming in a close second among the explanations for this phenomenon." *Id.* (footnotes and citations omitted).

[13] It is available at www.bop.gov/locations/institutions/lor/LOR_aohandbook.pdf.

pass to retaliate on the basis of such complaints—which would be protected if reduced to writing—[would] make[] no sense." *Pearson*, 471 F.3d at 741.

For these reasons, the district court erred in holding, as a matter of law, that Mack did not engage in protected conduct.

B. Mack Pleaded Adverse Action: Removal From His Work Assignment At The Commissary.

An inmate fulfills the second element of a retaliation claim by alleging an "adverse action" against him that would deter a person of ordinary firmness from exercising his rights. *See Rauser*, 241 F.3d at 333. "[T]he termination of prison employment is a sufficient deterrent to meet the pleading standard for a retaliation claim." *Sims v. Piazza*, 462 F. App'x 228, 233 (3d Cir. 2012); *see also* A48 (this Court observing in Mack's earlier appeal "that the loss of employment opportunities may qualify") (citing *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000)). Thus, as this Court said previously in this case, "Mack has sufficiently alleged adverse action in the form of loss of employment." A48.

C. Mack Pleaded A Causal Connection Between His Protected Conduct And The Adverse Action.

An inmate fulfills the final element of a retaliation claim by alleging that the constitutionally protected conduct was "'a substantial or motivating factor' in the decision to discipline" the inmate. *Rauser*, 241 F.3d at 333. At the pleading stage, Mack need only plausibly allege that his protected conduct was a motivating factor

in his removal from his commissary position. *See id.* at 333–34. He has done so. The causal link can be established by "an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action." *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). Temporal proximity exists here, as Mack was notified that he was removed from his job shortly (just about a week) after reporting misconduct to Stephens, despite having worked there dutifully for months. Moreover, as this Court noted in its previous opinion in this case, the word "retaliation" in a complaint "'sufficiently implies a causal link.'" A49 (quoting *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003)). Mack's *pro se* pleadings used such language, A33; A42(¶¶52–53); A59(¶24); A60(¶34), and alleged that immediately upon being told of his removal, he asserted that he was being removed for having complained, A40(¶41); A59(¶23–24). Thus, as this Court observed in its earlier opinion in this case, "Mack has sufficiently alleged a causal connection between his complaint to the commissary supervisor and the loss of his job." A48.

* * *

In conclusion, Mack has stated a First Amendment retaliation claim based on his complaint about the officers' anti-Muslim hostility.

II. Mack Has Stated Claims Under RFRA And The Free Exercise Clause.

Mack's *pro se* filings, construed liberally, state claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, and the Free Exercise Clause. We address these two claims in the sequence that the district court addressed them. And we explain that Mack's allegations suffice to plead a substantial burden on his religious exercise, though he need not establish a substantial burden to state a claim under the Free Exercise Clause.

A. Mack Has Stated A Claim Under RFRA.

Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). RFRA was a reaction to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which held that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "Government . . . demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest;

and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b).[14]

RFRA's purpose is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). RFRA does so by restoring the pre-*Smith* balancing test from *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963). 42 U.S.C. § 2000bb(b)(1). Under *Sherbert* and *Yoder*, a burden on religious exercise is substantial if:

> 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007). The pressure or coercion need not be direct. *See Sherbert*, 374 U.S. at 404.

Here, Mack was targeted because of his religion. Officers Roberts and Venslosky demonstrated, in front of Mack and the other inmate commissary workers, that Mack's religious beliefs were unacceptable. With Venslosky's approval, Roberts assaulted Mack while mocking a core tenet of his religion: the

[14] "Government" includes a "department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity." 42 U.S.C. § 2000bb-2(1).

prohibition against eating and handling pork. Then came Roberts's malicious announcement, again met with Venslosky's approval and conveyed in the presence of the other inmates, that "there's no good Muslim, except a dead Muslim!" Inmates naturally could have perceived these acts and words as a signal that the authorities endorsed anti-Muslim hostility and might even condone violence against Mack. Mack feared for his safety and worked "nervously[,] not knowing whether an inmate commissary worker may act out on Defendant Roberts['s] statement and attempt to physically harm [him] for being a Muslim." A39(¶35).

With each incident, moreover, Roberts told Mack, "You'll be looking for another job soon!" A58. Insofar as Roberts was signaling that he planned to have Mack removed from his commissary position because Roberts disapproved of Mack's religious beliefs, Mack's firing presents a clear case of unconstitutional retaliation for following the dictates of his religion. An inmate in Mack's position could also have understood Roberts to be pressuring Mack to resign from his commissary position (to start "looking for another job") to escape anti-Muslim harassment. Mack could practice his religion in peace and security if he would forfeit his valued commissary position; or he could stick with that work assignment and either continue to be targeted for his religious beliefs or modify his religious behavior in violation of his beliefs. The pressure imposed by such a choice is itself a substantial burden.

And, in fact, the harassment and intimidation *did* induce Mack to modify his behavior by refraining from a daily religious prayer ritual. Mack explained that, by targeting his religious beliefs in the presence of other inmates, Defendants "created a threatening [and] hostile environment, that literally caused plaintiff to change his behavior in that plaintiff would no longer pray in that area." District Ct. Docket No. 42 at 14 (Pl.'s Mem. in Opp'n 14) (citing the amended complaint's assertion that the hostility caused Mack to fear he might "be harmed because of his religious beliefs"). Islam requires prayer five times daily, at prescribed intervals, marked by certain movements and routines.[15] One may reasonably infer (and Mack can establish) that Mack had been following the daily ritual *before* the anti-Muslim harassment began, by praying in the commissary area during his breaks, *see*

[15] *See Williams v. Morton*, 343 F.3d 212, 219 (3d Cir. 2003) (noting that practicing Muslims must pray five times daily); *Mohammad v. Kelchner*, No. 3:03-cv-1134, 2005 WL 1138468, at *1 (M.D. Pa. Apr. 27, 2005) ("The Qu'ran commands that Muslims pray five times a day. When a Muslim prays, he kneels on the ground, and prostrates his upper body to the floor."). As the Second Circuit has explained, "The timing of each prayer is dictated by the proximity of the sun, moon and earth, with the day's first prayer taking place shortly before sunrise, the fifth occurring approximately two hours after dark, and the second, third and fourth in between. Each prayer lasts between five and 10 minutes." *Chatin v. Coombe*, 186 F.3d 82, 84 (2d Cir. 1999). "During prayer, the worshipper moves through a series of positions known as a 'rakat.'" *Id.* "To perform a rakat, the worshipper (1) stands and faces Mecca, (2) raises his hands to his ears, (3) bows with his hands either in front of him or at his side, (4) returns to a standing position, (5) kneels with knees, toes, hands and part of the face touching the ground, (6) sits, (7) returns to the bowing position, and (8) stands." *Id.* "The worshipper performs between two and four rakats depending on the prayer." *Id.*

A60(¶32) (alleging he prayed during breaks), but that the harassment and intimidation coerced him to forgo these visible prayer rituals, for fear of aggravating anti-Muslim hostility. As a Muslim inmate working under the charge of a correctional officer who had conveyed that the only good Muslim is a dead one, Mack felt substantial pressure to modify his behavior to avoid the wrath of those who would witness his prayer ritual. But not even modifying his behavior could save Mack's job, as Defendants removed him based on a phony charge.

Yet the district court held that "Defendants did not substantially burden his religious exercise." A16. The court seized on two statements from Mack's pleadings. First, the court invoked Mack's statement that "non pork or halal (lawful) products were made available to [M]uslim and [J]ewish inmates alike for purchase from the commissary." A18 (quoting A60(¶33)). True, Defendants did not pull such food items from the commissary shelves. But that is irrelevant to the substantial-burden inquiry, which "asks whether the government has substantially burdened religious exercise . . . ., not whether the . . . claimant is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862 (applying RFRA's cognate statute, RLUIPA).

Second, the district court seized (*see* A18) on another paragraph of Mack's amended complaint in which he was trying to establish that Defendants knew he was a Muslim before they engaged in harassment. Specifically, Mack had asserted

that "[v]ia religious policy" (presumably BOP or FCI Loretto policies requiring that officials accommodate prayer), Defendants had allowed Mack "'a suitable area to pray during breaks.'" A18 (quoting A60(¶32)). To be sure, Defendants did not directly stop Mack from praying. They were not so naive as to do *that*. *Cf. Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994) (observing that "'few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such'") (quoting *Smith*, 494 U.S. at 894 (O'Connor, J., concurring)). But "a burden can be 'substantial' even if it does not compel or order the claimant to betray a sincerely held religious belief." *Yellowbear v. Lambert*, 741 F.3d 48, 55 (10th Cir. 2014). *Indirect* pressure to modify behavior may substantially burden religious exercise. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.").

As another circuit recently confirmed, harassment can substantially burden an inmate's religious exercise by chilling prayer. *See Jehovah v. Clarke*, 798 F.3d 169, 180 (4th Cir. 2015). *Jehovah* involved a Christian inmate's claim under RFRA's cognate statute, RLUIPA. The plaintiff alleged he was intentionally assigned a cellmate who was a "self-proclaimed Satanist and anti-Christian," *id.* at 174, and that his cellmate's mockery and harassment burdened the plaintiff's

ability to pray and express his faith, *id.* at 180 ("Jehovah states [in his complaint] that he was 'burdened, mocked, and harassed on account of [h]is religious views by being housed in a cell with' this inmate."). He sufficiently pleaded a substantial burden because "it is reasonable to infer that [his] religious practices were chilled by his cellmate's religiously motivated harassment." *Id.* The same reasoning applies here, where Roberts and Venslosky chilled Mack's prayer. Mack has stated a valid claim under RFRA.

B. Mack Has Stated A Claim Under The Free Exercise Clause.[16]

Although "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment," *Holt*, 135 S. Ct. at 859 (citing *Smith*, 494 U.S. at 878–82), government action that is not neutral and generally applicable "must undergo the most rigorous scrutiny," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Government fails to act in a neutral, generally

[16] The district court addressed this claim. In its Rule 59 order, the court remarked that "Mack never raised a *Bivens* free exercise claim." A24. But he explicitly asserted this claim when he filed this action. A42(¶50) ("The discrimination toward Plaintiff for exercising his religious choice to practice Islamic Muslim beliefs . . . constituted an infringement upon plaintiff's right to free exercise of religion under the First Amendment to the United States Constitution."). In the earlier appeal, this Court remarked that the Magistrate Judge had failed to "address whether [Mack] stated, or by amendment could state, a free exercise claim." A50. Mack's amended complaint alleged he was targeted for his religious beliefs "in violation of the First Amendment," A56, which includes the Free Exercise Clause.

applicable manner when it discriminates against a particular religion or targets religious conduct. *See id.* at 533; *Brown*, 35 F.3d at 849. Unquestionably, government authorities cannot lawfully "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert*, 374 U.S. at 402.

Accordingly, when "[o]fficial action . . . targets religious conduct for distinctive treatment," *Lukumi*, 508 U.S. at 534, the plaintiff need not show a "substantial burden" on his religious exercise, *see Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) ("Under *Smith* and *Lukumi*, however, there is no substantial burden requirement when government discriminates against religious conduct."); *Brown*, 35 F.3d at 849 (holding that the substantial-burden "analysis is inappropriate for a free exercise claim involving intentional burdening of religious exercise"). Indeed, as this Court has observed, "[a]pplying such a burden test to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown*, 35 F.3d at 849–50.

This Court in *Brown* explained why the substantial-burden requirement has no role to play in cases of purposeful antireligious harassment. *See id.* "The 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence . . . in order to balance the tension between religious rights

and valid government goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." *Id.* at 849. This burden test presupposes the government's pursuit of a legitimate, secular interest. *See id.* at 850 ("A burden test is only necessary to place logical limits on free exercise rights in relation to laws or actions designed to achieve legitimate, secular purposes."). But because no legitimate interest is served by intentionally targeting religious beliefs for harassment, the burden test has no role to play. *Id.* ("Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such actions.").[17]

In *Brown*, the defendants had intentionally locked a gate on public land to impede travel through a park to religious revival services that were being held on adjacent private land. *Id.* at 848. The gate was locked for a few days during the weeklong event, and the obstruction was but a slight impediment for those who attended, as they had "to park outside the gate and walk 100 to 200 feet to reach the tent." *Id.* The district court entered summary judgment against the plaintiffs on their Free Exercise Clause claim, holding that they failed to establish a

[17] Because, as *Brown* recognizes, such intentional targeting serves no legitimate governmental purpose, Defendants here cannot seek refuge in the deferential standard in *Turner v. Safley*, 482 U.S. 78 (1987), under which neutral prison regulations generally pass constitutional scrutiny when they are "reasonably related to legitimate penological interests," *id.* at 89.

substantial burden. *Id.* at 849. But this Court reversed because "[a] burden test is only necessary" for "laws or actions designed to achieve legitimate, secular purposes." *Id.* at 850. By contrast, "cases which address acts or laws which target religious activity have never limited liability to instances where a 'substantial burden' was proved by the plaintiff." *Id.* at 849. Accordingly, this Court in *Brown* "remand[ed] to the District Court for a determination, based on consideration of the entire record, of whether the plaintiff ha[d] introduced sufficient evidence on the issue of intentional targeting to resist summary judgment." *Id.* at 850.

Here, Defendants purposefully targeted Mack based on his religion. Thus, Mack was not required to allege a substantial burden to state a Free Exercise Clause claim—although, as explained above, his allegations suffice to plead a substantial burden on religious exercise. *See* Part II.A, *supra.*

Nonetheless, the district court dismissed this claim because "Mack does not state that Defendants *denied* him the opportunity to pray, to eat foods of his choosing, to congregate with inmates of similar belief, to read religious texts, or to choose any other method of exercising his religious beliefs." A20 (emphasis added). The court appears to have required an affirmative denial of religious exercise—like an order prohibiting Mack from praying. But this not only ignores the law on indirect coercion discussed above (*see* Part II.A), it essentially demands a substantial burden. Contrary to *Brown*, the district court's reasoning effectively

renders "petty harassment of religious institutions and exercise immune from the protection of the First Amendment." 35 F.3d at 849–50.

To be sure, when a prison regulation curtails one means of religious exercise *for a reason that serves a legitimate penological interest*, the availability of alternative means of practicing religion is a relevant consideration in determining whether a violation has occurred. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351–52 (1987); *see also Turner*, 482 U.S. at 90. But Roberts and Venslosky were not applying a regulation designed to serve a legitimate penological interest. Rather, they were acting contrary to BOP policies against disparaging and discriminating on the basis of religious beliefs.

Accordingly, the district court erred in holding that Mack failed to state a valid claim under the Free Exercise Clause.

III. Mack Has Stated An Equal Protection Claim.

As this Court has observed, the Supreme Court has long implied "that religious classifications are treated like others traditionally subject to heightened scrutiny, such as those based on race," and has "considered religious discrimination to be a classic example of 'a denial of the equal protection of the laws to the less favored classes.'" *Hassan*, 804 F.3d at 299–300 (citations omitted); *see also id.* (citing Third Circuit cases noting that distinctions based on religion, like race, are inherently suspect). Accordingly, "intentional

discrimination based on religious affiliation must survive heightened equal-protection review." *Id.* at 301.

Mack's allegations, construed liberally, support a plausible inference that disapproval of his religious beliefs played a role in his removal from his commissary position, as the same officers were presumably involved. After Roberts assaulted Mack, mocked his religious beliefs, and delivered his (Roberts's) opinion that the only "good Muslim" is a "dead Muslim!" (*see* A39(¶33))—a comment obviously conveying anti-Muslim animus—Roberts exclaimed that Mack would "be looking for another job soon!" Soon thereafter, Venslosky notified Mack that he had been fired, delivering a pretextual justification that Mack allegedly had been caught bringing in slips for other inmates.

In its Rule 12(b)(6) order, the district court held that Mack cannot state an equal protection claim because, the court said, he failed to identify similarly situated persons who were treated differently. A11. But by alleging he was "*targeted* . . . on account of [his] belief in Islam and being a practicing Muslim," A59 (emphasis added), Mack indicated he was *singled out* for that reason, warranting an inference that non-Muslim prisoners were not similarly harassed. In his opposition to the motion to dismiss, Mack added that Christian inmates also worked in the commissary, but they were not treated with hostility because of their religion. District Ct. Docket No. 42 at 5. Surely these statements by a *pro se*

litigant suffice at the pleading stage to allege differential treatment for similarly situated inmates.

In his Rule 59(e) motion, Mack argued that if the court wanted him to identify the inmates who were not harassed for *their* religious beliefs, he should be permitted leave to amend to identify them. A68. The court responded that Mack could not assert an equal protection claim because he "is not challenging the express terms of a statute or prison regulation, nor is he asserting that prison officials administered any statute or regulation in a discriminatory manner." A23. But Mack's allegations support an inference that Defendants administered the work program in a discriminatory manner, by subjecting him to anti-Muslim ridicule and harassment and by having him removed from the work assignment at the commissary. *See Davis v. Prison Health Servs.*, 679 F.3d 433 (6th Cir. 2012).

In *Davis*, an inmate who alleged he was removed from his job in a work program because of his sexual orientation (which, unlike religion, did not implicate a suspect classification) stated an equal protection claim. *Id.* at 438. The plaintiff alleged that, before his removal and because of anti-gay animus, "officers supervising his work crew treated him differently than other inmates, ridiculed and belittled him, and 'ma[d]e a spectacle' of him when they brought him back to the correctional facility after a public-works assignment." *Id.* He further alleged that these officers persuaded the prison's health-unit manager "to use concerns about

[the plaintiff's] diabetic condition as a pretext for removing him from the public-works program." *Id.* at 436. He claimed that the officers "were looking for a reason, 'even if that reason was invalid,' to have him removed from the public-works program in order to 'eliminat[e] the need to have to deal with a homosexual' and claimed that the officers found just such a pretextual reason when he suffered what he believed at the time to be a diabetic episode while on a public-works assignment." *Id.* at 438.[18] Based on "[t]he combined effect" of the plaintiff's allegations, he "stated a plausible claim that he was improperly removed from the public-works program based upon the defendants' anti-gay animus." *Id.* at 439.

Likewise, based on the combined effect of Mack's allegations, he states a plausible claim that the officers' anti-Muslim animus played a role in the decision to have him removed (his complaint to Stephens also served as a motivating factor in that decision). Mack has stated an equal protection claim.

CONCLUSION

The district court's judgment dismissing this case should be reversed.

[18] The plaintiff in *Davis* also alleged that similarly situated prisoners were treated differently, but that was not outcome determinative because the Sixth Circuit held that "even if Davis had failed to include allegations about similarly-situated prisoners, his complaint still should not have been dismissed at the pleadings stage." 679 F.3d at 439–40.

Dated: December 1, 2015

Respectfully submitted,

s/ Sean E. Andrussier
Sean E. Andrussier
North Carolina Bar No. 25790
DUKE UNIVERSITY SCHOOL OF LAW
APPELLATE LITIGATION CLINIC
Box 90360, 210 Science Drive
Durham, North Carolina 27708
(919) 613-7280
Court-Appointed Counsel for Appellant

On the brief:

John Bailey
Anne Showalter
Russell Taylor

Students, Duke University School of Law

RULE 46.1 CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1 (e), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

s/ Sean E. Andrussier

Dated: December 1, 2015

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, TYPEFACE, AND TYPE STYLE REQUIREMENTS, AND WITH 3d Cir. LOCAL APPELLATE RULE 31.1(c)

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Dated: December 1, 2015 s/ Sean E. Andrussier

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 1st day of December, 2015, the foregoing Brief for Appellant was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF System. I also certify that I caused seven paper copies to be delivered by UPS Next Day Air, which will send notice of such filing to the following registered CM/ECF users:

Service was accompanied on the following by the CM/ECF system:

Rebecca Haywood, Esq.
U.S Attorney's Office
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
Counsel for Appellees

Dated: December 1, 2015 s/ Sean E. Andrussier

RECORD NO. 14-2738

In The
United States Court of Appeals
For The Third Circuit

CHARLES MACK,

Plaintiff – Appellant,

v.

JOHN YOST, Warden; TIM KUHN, Associate Warden; JEFF STEVENS, Trust Fund Officer, Sued in their Individual and Official Capcities; D. VESLOSKY, Correctional Officer; DOUG ROBERTS, Correctional Officer Sued in their individual capacities,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX
VOLUME I OF II
(Pages 1 – 25)

Sean E. Andrussier
DUKE UNIVERSITY SCHOOL OF LAW
Box 90360
210 Science Drive
Durham, North Carolina 27708
(919) 613-7280

Counsel for Appellant

Rebecca R. Haywood
OFFICE OF THE U.S. ATTORNEY
700 Grant Street, Suite 4000
Pittsburgh, Pennsylvania 15219
(412) 894-7367

Counsel for Appellees

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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

CHARLES MACK, Plaintiff, v. JOHN YOST, Warden; TIM KUHN, Associate Warden; JEFF STEVENS, Correctional Officer; D. VESLOSKEY, Correctional Officer; and DOUG ROBERTS, Correctional Officer, Defendants.	CIVIL ACTION # 3:10-264 JUDGE KIM R. GIBSON

NOTICE OF APPEAL

Charles Mack pro se, the plaintiff in the above captioned case appeals pursuant to Federal Rules Appellate Procedure Rule 4 (a)(1)(B), from the order of the district court judge entered on the 3rd day of April, 2014.

Dated: 5-9-14

Charles Mack

Charles Mack pro se
Reg.# 51900-066
P. O. Box 1000
FCI Loretto
Loretto, PA 15940

CERTIFICATE OF SERVICE

I Charles Mack hereby certify that a copy this Notice of Appeal has been mailed first class mail to the following:

Jennifer R. Andrade
Assistant U.S. Attorney
U.S. Courthouse and Post Office
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
Counsel for the Defendants

Date: 5-9-14

Charles Mack
Charles Mack pro se
Reg.# 51900-066

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

CHARLES MACK,	)	
	)	
Plaintiff,	)	**CIVIL ACTION NO. 3:10-264**
	)	
v.	)	**JUDGE KIM R. GIBSON**
	)	
JOHN YOST, *Warden*; TIM KUHN, *Associate Warden*; JEFF STEVENS, *Trust Fund Officer*; D. VESLOSKY, *Correctional Officer*; and DOUG ROBERTS, *Correctional Officer*,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER OF COURT

I. SYNOPSIS

This matter comes before the Court on Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 36). Plaintiff Charles Mack, a federal inmate at the Federal Correctional Institution in Loretto, Pennsylvania ("FCI Loretto"), seeks damages resulting from alleged incidents of religious discrimination. Defendants contend, *inter alia*, that Mack's allegations do not give rise to constitutional or statutory claims and that Mack has failed to exhaust available administrative remedies. For the reasons that follow, Defendants' motion to dismiss will be granted.

II. JURISDICTION AND VENUE

The Court exercises federal subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Venue is proper under 28 U.S.C. 1391(b)(2) because a substantial portion of the events or omissions giving rise to the claims occurred in the Western District of Pennsylvania.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff Charles Mack was hired to work at the FCI Loretto commissary in May 2009, where he earned about $110 per month. (*See* Doc. No. 22, Am. Compl. ¶¶ 8, 11). As a commissary employee, Mack stocked shelves, filled inmate commissary orders, and cleaned the work area. (*See id.* ¶ 9). Mack alleges that, on or about October 2009, Defendant Doug Roberts, the Trust Fund Supervisor, "forcefully slapped [him] in the center of his back" and placed a sticker on his back stating "I LOVE BACON." (*See id.* ¶¶ 12, 16). Mack also alleges that Defendant Samuel Venslosky,[1] the Warehouse Worker Foreman, failed to reprimand Roberts even though he saw the incident. (*See id.* ¶ 15).

Mack is a practicing Muslim who does not eat or handle pork-based products. (*Id.* ¶ 16). The day after the initial incident, Mack allegedly asked Roberts why he placed the sticker on Mack's back when Roberts "knew that pork products are forbidden in Islam, and offensive to [M]uslims." (*Id.* ¶ 17). Roberts purportedly responded, "[W]hy? [D]o you have a problem with that?," and thereafter responded, "[D]on't worry[,] you'll be looking for another job soon!" (Doc. No. 22, Am. Compl. ¶ 17). Mack avers that, approximately two days later, Roberts shouted in the presence of inmate workers, "[T]here is no good muslim, except a dead muslim!" (*Id.* ¶¶ 18–19). According to Mack, these statements created a "tense work environment," causing Mack to believe that "he could possibly be harmed because of his religious beliefs." (*Id.* ¶ 20).

Mack thereafter orally complained to Defendant Jeffrey Stephens,[2] who is the former Trust Officer and supervisor to Roberts and Venslosky. (*Id.* ¶ 21). Stephens responded by stating that he would "look into it." (*Id.*). Approximately one week later,

[1] Mack incorrectly identifies Samuel Venslosky as "D. Veslosky."
[2] Mack incorrectly identifies Jeffrey Stephens as "Jeffrey Stevens."

Venslosky fired Mack from his commissary job for "bringing in commissary lists." (*Id.* ¶ 22). Believing that the actual reason for his termination was retaliation for complaining about the alleged harassment, Mack informed Stephens about the situation. (*See* Doc. No. 22, Am. Compl. ¶¶ 23–24).

Mack initiated the "informal resolution process" at FCI Loretto on November 13, 2009, when Mack requested to know in writing why he was fired from his commissary job. (*See* Doc. No. 22, Am. Compl. ¶ 25; Doc. No. 38-3 at 10). On November 13, 2009, Stephens responded to this grievance, BP-S148.055 ("Inmate Request to Staff Form"), stating, "Inmate was caught bringing slips in for inmates." (Doc. No. 38-3 at 10). Mack subsequently made an oral complaint to Defendant John Yost, the former Warden of FCI Loretto. (*See* Doc. No. 22, Am. Compl. ¶ 27). Yost allegedly responded, "[W]hat do you expect me to do?" (*Id.* ¶ 28).

The administrative grievance process began on November 21, 2009, when Mack filed Form BP-8½ ("Administrative Remedy Informal Resolution Form"). (*See* Doc. 38-3 at 5). Mack then exhausted the grievance process by filing Forms BP-9 ("Request for Administrative Remedy"); BP-10 ("Regional Administrative Remedy Appeal"); and BP-11 ("Central Office Administrative Remedy Appeal"). (*See* Doc. 38-3 at 1–14).

On October 19, 2010, Mack filed suit against Yost and other prison personnel under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.* (2006). (*See* Doc. No. 1, Compl. ¶¶ 50–54). Alleging violations of the First Amendment to the United States Constitution, Mack seeks nominal damages, punitive damages, and injunctive relief. (*See id.*). The United States

magistrate judge assigned to the case issued a Report and Recommendation ("R&R"), concluding that the complaint should be dismissed without leave to amend for failure to state a claim. (Doc. No. 3 at 1).

After requiring Mack to clarify his objections to the R&R, this Court adopted the R&R and dismissed the complaint on November 30, 2010. (*See* Doc. No. 8). On appeal, the Third Circuit Court of Appeals vacated this Court's dismissal of Mack's complaint, directing this Court to reconsider its previous ruling. *See Mack v. Yost*, 427 F. App'x 70 (3d Cir. 2011) (Doc. No. 17-1 at 8). In particular, the Third Circuit instructed this Court to reevaluate Plaintiff's retaliation claim and allegations of mistreatment on the basis of religion. (Doc. No. 17-1 at 5, 6).

This Court issued a Memorandum Order on April 12, 2012, instructing Mack to file an amended complaint that identifies the "constitutionally protected conduct" forming the basis of his retaliation claim(s). (*See* Doc. 21 at 2). This Court further construed Mack's original complaint as attempting to assert the following claims: (1) a violation of the Free Exercise Clause of the First Amendment; and (2) a violation of the RLUIPA. (*Id.*). After providing the relevant legal standards, this Court instructed Mack to identify the alleged mistreatment forming the basis of his free exercise and RLUIPA claims. (*See id.* at 3).

Mack filed an amended complaint (Doc. No. 22) on May 5, 2012, and Defendants filed the instant motion (Doc. No. 36) on October 4, 2012. Defendants assert that there have been no constitutional violations and, alternatively, that the doctrines of sovereign and qualified immunity bar Mack's claims. (Doc. No. 38 at 2–3). Defendants further assert that the RLUIPA does not apply to federal prisons and that Mack has failed to exhaust his available administrative remedies. (*See id.* at 3). Mack filed a memorandum in

opposition to Defendants' motion (Doc. No. 42) on November 29, 2012. The motion has been fully briefed and is ripe for disposition.

IV. STANDARD OF REVIEW[3]

The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Federal Rule of Civil Procedure 12(b)(6) allows a party to seek dismissal of a complaint or portion of a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Although the federal pleading standard has been "in the forefront of jurisprudence in recent years," *Fowler v. UPMC Shadyside*, 548 F.3d 203, 209 (3d Cir. 2009), the standard of review for a Rule 12(b)(6) challenge is now established.

In determining the sufficiency of the complaint, a district court must conduct a two-part analysis. First, the court must separate the factual matters averred from the legal conclusions asserted. *See Fowler*, 578 F.3d at 210. Second, the court must determine whether the factual matters averred are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 211 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). The complaint need not include "detailed factual allegations." *Phillips v. Cnty. of Allegheny*,

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[3] Defendants have filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. (Doc. No. 38). Rule 12(d) of the Federal Rules of Civil Procedure provides as follows:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d). A district court must provide the parties with adequate notice when converting a motion to dismiss into a motion for summary judgment. *See, e.g.*, *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). The Court finds that converting the motion to dismiss into a motion for summary judgment is not appropriate in this case because Mack is a pro se prisoner litigant. *See Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (discussing how district courts must provide notice to pro se prisoners when converting a motion to dismiss into a motion for summary judgment and, in particular, should inform pro se prisoners about the effects of not filing opposing affidavits). The Court will treat the instant motion as one to dismiss, using the standard of review set forth in this memorandum.

515 F.3d 224, 231 (3d Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Moreover, the court must construe the alleged facts, and draw all inferences gleaned therefrom, in the light most favorable to the non-moving party. *See id.* at 228 (citing *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003)). However, "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action . . . do not suffice." *Iqbal*, 556 U.S. at 678. Rather, a complaint must present sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 263 n.27 (3d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

Ultimately, whether a plaintiff has shown a "plausible claim for relief" is a "context specific" inquiry that requires the district court to "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The relevant record under consideration includes the complaint and any "document integral or explicitly relied on in the complaint." *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388 (3d Cir. 2002) (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). If a complaint is vulnerable to dismissal under Rule 12(b)(6), the district court must permit a curative amendment, irrespective of whether a plaintiff seeks leave to amend, unless such amendment would be inequitable or futile. *Phillips*, 515 F.3d at 236; *see also Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) ("[L]eave to amend generally must be granted unless the amendment would not cure the deficiency."). The Court is also mindful that, in cases such as this one, a prisoner's pro se complaint should be "held to less stringent standards than formal pleadings drafted by lawyers." *United States ex rel. Walker v. Fayette Cnty., Pa.*, 599 F.2d 573, 575 (3d Cir. 1979) (citing *Haines v. Kerner*, 404 U.S. 520, 521 (1972)).

V. DISCUSSION

Defendants assert several theories on which they argue that a motion to dismiss is warranted. First, Defendants argue that Mack's *Bivens* claims should be dismissed because the allegations do not give rise to constitutional violations.[4] Second, Defendants argue that Mack has not established statutory violations under the RLUIPA. And third, Defendants assert that Mack has not exhausted available administrative remedies. The Court will address each of these arguments.

A. Constitutional Claims under *Bivens*

Mack brings suit for alleged constitutional violations under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that a damages claim arose under the United States Constitution where federal officers, acting under color of federal law, violated the Fourth Amendment. *See id.* at 398. More recently, a "*Bivens* action" has been interpreted as "the federal equivalent of the § 1983 cause of action against state actors" and exists where federal officers, acting under color of federal law, violate a plaintiff's constitutional rights. *Brown v. Philip Morris Inc.*, 250 F.3d 789, 800 (3d Cir. 2001). Here, Mack raises two constitutional claims.[5] Mack avers that (1) Defendants discriminated against him based on his religion,

[4] Defendants further argue that the doctrines of qualified and sovereign immunity bar Mack's claims and that Defendants Yost, Kuhn, and Stephens should be dismissed because there is no allegation that they personally violated Mack's constitutional rights. (*See* Doc. No. 38 at 18–23). Because the Court will dismiss Mack's claims on other grounds, it is unnecessary to address these arguments.

[5] Defendants argue that Mack has not alleged an actionable Eighth Amendment claim. In Mack's original complaint, he asserted that his "unsafe [working] conditions" constituted "cruel and unusual punishment under the Eighth Amendment." (*See* Doc. No. 1, Compl. ¶ 51). However, Mack does not raise an Eighth Amendment issue in his amended complaint, (*see* Doc. No. 22, Am. Compl. ¶¶ 34–36), and Mack specifically states in his reply to Defendants' motion that he is not asserting an Eighth Amendment claim, (Doc. No. 42 at 10). Defendants also argue that, to the extent Mack raises a due process claim, it fails because inmates do not have a liberty or property interest in prison employment. (*See* Doc. No. 38 at 8–9). Mack states in his reply brief that he does not assert a property or liberty interest concerning his former work

in violation of his equal protection rights under the Fifth Amendment; and (2) that Defendants retaliated against him after he exercised his First Amendment right to seek redress. (*See* Doc. No. 22, Am. Compl. ¶¶ 34–36).

1. Equal Protection under the Fifth Amendment

Although Mack does not specifically raise an equal protection issue in his amended complaint, he argues in his reply to Defendants' motion to dismiss that he was "singled out . . . due to his religious faith" and that "no other inmate whom [sic] worked in the commissary was treated with hostility because of their religion." (Doc. No. 42 at 5). Defendants argue that Mack has failed to state an actionable equal protection claim to the extent one was raised in the amended complaint. The Court will address this argument in an effort to liberally construe Mack's amended complaint.

Although the Fifth Amendment does not contain an equal protection clause, the Supreme Court has interpreted the Fifth Amendment to contain an equal protection guarantee. *See, e.g.*, *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 (3d Cir. 2001) (citing *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). "Fifth Amendment equal protection claims are examined under the same principles that apply to such claims under the Fourteenth Amendment." *Id.* at 316–17 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)). The Equal Protection Clause of the Fourteenth Amendment requires all persons "similarly situated" to be "treated alike" by state actors. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). To state an equal protection claim, Mack must allege (1) that he is a protected class member and (2) that he was treated differently from similarly situated persons outside his protected class. *See Tillman v. Lebanon Co. Corr.*

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assignment. (*See* Doc. No. 42 at 6). Because Mack has not raised these claims and, instead, he specifically rejects them, the Court will not address these arguments.

Facility, 221 F.3d 410, 423–24 (3d Cir. 2000); *Andrews v. City of Phila.*, 895 F.2d 1469, 1478 (3d Cir. 1990). "Protected classes include those based upon suspect distinctions, such as race, religion, and alienage, and those impacting fundamental rights." *Trefelner ex rel. Trefelner v. Burrell Sch. Dist.*, 655 F. Supp. 2d 581, 589 (W.D. Pa. 2009).

Although Mack alleges that he was verbally harassed and discriminated against based on his religious affiliation, Mack has not identified any similarly situated individual whom prison officials treated differently. "Mere harassment based on a protected-class status without identification of similarly situated individuals outside of the class will not support an equal protection claim." *Baker v. Williamson*, CIV.1:CV-07-2220, 2010 WL 1816656 (M.D. Pa. May 5, 2010), *aff'd*, 453 F. App'x 230 (3d Cir. 2011) (citing *Hodge v. U.S. Dep't of Justice*, 372 F. App'x 264, 268 (3d Cir. 2010); *see also White v. Sch. Dist. of Phila.*, CIV.A. 05-0092, 2008 WL 2502137 (E.D. Pa. June 19, 2008), *aff'd*, 326 F. App'x 102 (3d Cir. 2009) ("To support a claim for violations of equal protection rights, '[a] plaintiff must at least allege and identify the actual existence of similarly situated persons who have been treated differently and that the government has singled out plaintiff alone for different treatment.'") (citations omitted). Accordingly, the Court will dismiss Mack's equal protection claim to the extent it was raised in the amended complaint.

2. Retaliation under the First Amendment

Among the central issues in this case is whether Mack has asserted an actionable retaliation claim. Mack avers that Roberts and Venslosky fired him from his employment because Mack exercised his "right to seek redress by way of (oral) grievance." (Doc. No. 22, Am. Compl. ¶ 35). As the Third Circuit has explained, "A prisoner alleging retaliation must show (1) constitutionally protected conduct, (2) an adverse action by prison officials

sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the exercise of his constitutional rights and the adverse action taken against him." *Mack v. Yost*, 427 F. App'x 70, 72 (3d Cir. 2011) (quoting *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003)). Once a prisoner shows these elements, the burden shifts to prison officials to prove that they "would have made the same decision absent the protected conduct." *Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001).

Defendants assert that Mack has failed to assert an actionable retaliation claim because Mack's informal complaint is not a constitutionally protected activity. (*See* Doc. No. 38 at 11). Filing an administrative grievance against prison officials is a protected activity for purposes of a retaliation claim. *See Robinson v. Taylor*, 204 F. App'x 155, 157 (3d Cir. 2006). In *Robinson*, the Third Circuit relied on *Davis v. Goord*, 320 F.3d 346, 352–53 (2d Cir. 2003), in finding that a prisoner's ability to file an administrative grievance is constitutionally protected. The *Davis* Court also relied on case precedent—*Graham v. Henderson*, 89 F.3d 75 (2d Cir. 1996), and *Franco v. Kelly*, 854 F.2d 584 (2d Cir. 1988)—to support that finding. The *Graham* Court held:

> [F]iling of a grievance and attempt to find inmates to represent the grievants—is constitutionally protected. This court has held that retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments and is actionable under § 1983. . . . The right to petition government for redress of grievances—in both judicial and administrative forums—is among the most precious of the liberties safeguarded by the Bill of Rights.

Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996) (internal punctuation and citations omitted). Similarly, the *Franco* Court held:

> Because of the clear relationship between the right of access to the courts and the right to petition for redress of grievances, we believe that . . . . [the prisoner litigant] should not be any less entitled to relief under section 1983

> because he was addressing his complaints to a state administrative agency rather than to a court of law.

Franco v. Kelly, 854 F.2d 584, 589–90 (2d Cir. 1988).

Here, however, Mack had not begun the formal grievance process by the time he was fired from his work assignment. Mack had not even initiated the "informal resolution process" by filing the "Inmate Request to Staff Form." (*See* Doc. No. 22, Am. Compl. ¶ 25; Doc. No. 38-3 at 10). Thus, this Court must determine whether an informal oral complaint to prison officials—without any type of administrative filing—fits within this realm of constitutionally protected conduct. The issue is one of first impression for the Court. *See, e.g.*, *Booth v. Pence*, 354 F. Supp. 2d 553, 561 n.6 (E.D. Pa. 2005), *aff'd*, 141 F. App'x 66 (3d Cir. 2005) (stating in dictum that "[t]he parties have not presented, and this court has not found, any Third Circuit decision on whether informal complaints from an inmate to a correctional officer constitute protected activity under the First Amendment right to petition the government for a redress of grievances").

In *Davis v. Goord*, the Second Circuit held that the filing of an administrative grievance is a constitutionally protected activity after reasoning that the right to petition the government for redress is no different whether the governmental entity is an administrative agency or a court of law. 320 F.3d at 352–53. In this case, however, Mack had not filed any type of petition whatsoever with an administrative agency before the alleged retaliation occurred. Moreover, courts should approach prisoner retaliation claims with "sufficient skepticism" because "retaliation claims can be easily fabricated," and courts must avoid "becoming entangled in every disciplinary action taken against a prisoner." *Miskovitch v. Hostoffer*, 721 F. Supp. 2d 389, 396 (W.D. Pa. 2010); *accord Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003); *Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996); *Woods v.*

Smith, 60 F.3d 1161, 1166 (5th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996). Indeed, "the task of prison administration is difficult, and [] courts should afford deference to decisions made by prison officials, who possess the necessary expertise." *Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001).

Because Mack had not filed a petition with an administrative agency, whether by formal or informal means, Mack has not shown constitutionally protected conduct for the purposes of a retaliation claim. An oral complaint to a prison guard is not a petitioning for the redress of grievances guaranteed by the First and Fourteenth Amendments. This finding is one of first impression for the Court, but one that remains consistent with applicable case law. *See, e.g.*, *Bowman v. City of Middletown*, 91 F. Supp. 2d 644, 664 (S.D.N.Y. 2000) (indicating in dicta that "case law can be read to suggest that the administrative remedies for which an inmate enjoys a First Amendment right of petition are limited to those set forth under state administrative law, such as sending a complaint to a state bureau of prisons, as opposed to informal or intra-prison complaints"). The Court will therefore dismiss Mack's retaliation claim.

B. Statutory Claims under the RLUIPA

Mack further alleges in his amended complaint that Defendants violated the RLUIPA. (Doc. No. 22, Am. Compl. ¶¶ 34, 36). Defendants contend that Mack has failed to establish a prima facie case under the RLUIPA because the Act does not apply to federal prisons. Defendants further assert that the Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321–77 (1996), precludes this Court from considering claims under the RLUIPA.

1. Administrative Exhaustion under the PLRA

Before addressing the merits of Mack's statutory claims, the Court must consider whether Mack has satisfied the PLRA's administrative exhaustion scheme.[6] Under the PLRA, a prisoner must exhaust any remedies available through the prison grievance system before filing suit in federal court. Specifically, the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2006). Although courts have only begun to "define the contours" of the PLRA's exhaustion provision, *see Spruill v. Gillis*, 372 F.3d 218, 222 (3d Cir. 2004), it is clear that unexhausted claims cannot be brought in court. *See Jones v. Bock*, 549 U.S. 199, 211 (2007); *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

In this case, Mack initiated the formal administrative grievance process by filing Form BP-9 ("Request for Administrative Remedy"), which stated, in pertinent part:

> I was Discriminated against, And I got fired from my job for no reason. Mr. Doug Roberts placed his hand on me in a threatening manner, and I asked what is your problem. He stated "Do you have a problem with me placing my hands on you" And I stated yes I do. Then Mr. Roberts said you will be looking for another job soon. Mr. Roberts placed a lable [sic] (sticker) on my back stating (I Love Bacon) which is clearly forbidden in Islamic belief. And that's not the first time Mr. Roberts made Racist Religious remarks about my religious beliefs. Such as "There's no good Muslims except Dead Muslims." Which is clearly . . . . [an] attack [on] my first Amendment rights to freely practice my religious belief, and which caused a hostile environment. . . .

[6] Defendants also argue that Mack has not exhausted his available administrative remedies with respect to other claims, including Mack's retaliation claim and the claim that Yost, Kuhn, and Stephens personally violated Mack's constitutional rights. Because the Court has already determined that Mack's alleged constitutional claims are without merit, it will not address these arguments.

(Doc. No. 38-3 at 2). Defendants concede that Mack has properly exhausted the grievance procedure with regard to the allegations in Form BP-9. (Doc. No. 38 at 27; Doc. No. 38-1 at 3–4). Thus, in asserting that Mack has not exhausted available administrative remedies with regard to his RLUIPA claim, Defendants essentially argue that the grievance forms and the complaint must be identical. But this is an incorrect interpretation of the PLRA's exhaustion requirement. "As long as there is a shared factual basis between the two, perfect overlap between the grievance and a complaint are not required by the PLRA." *Jackson v. Carroll*, 643 F. Supp. 2d 602, 614 (D. Del. 2009) (citing *Woodford v. Ngo*, 548 U.S. 81, 95 (2006)). Perfect overlap is not necessary because the PLRA requires inmates to exhaust the administrative process "even when seeking a form of relief that the prison cannot provide, so long as the prison can afford some sort of relief." *Jackson*, 643 F. Supp. 2d at 614 (citing *Booth v. Churner*, 532 U.S. 731, 739 (2001).

Here, Mack claims that Defendants violated his rights under the RLUIPA; in doing so, Mack alleges the same facts set forth in BP-9. Because the grievance forms and the amended complaint have a shared factual basis, Mack has properly exhausted his available administrative remedies with regard to the RLUIPA claim. Defendants' PLRA exhaustion argument is without merit.

2. RLUIPA Claim

The next issue this Court must address is whether Mack has stated an actionable claim under the RLUIPA. For purposes of the RLUIPA, "government" is defined as (1) "a State, county, municipality, or other governmental entity created under the authority of a State"; (2) "any branch, department, agency, instrumentality or official" thereof; and (3) "any other person acting under color of State law." 42 U.S.C. § 2000cc–5(4)(A). Because

the RLUIPA does not apply to federal prisons, Mack cannot assert a claim under the RLUIPA. *See, e.g.*, *Rogers v. United States*, 696 F. Supp. 2d 472, 486 (W.D. Pa. 2010). The Court will therefore dismiss Mack's RLUIPA claim.

i. Potential RFRA Claim

Although Mack does not allege a violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, Defendants argue in their brief in support of the motion to dismiss that Mack cannot state a claim under this Act. (*See* Doc. No. 28 at 24). Because provisions under the RFRA are "nearly identical" to those under the RLUIPA, *see Norwood v. Strada*, 249 F. App'x 269, 271 (3d Cir. 2007), the Court will address whether Mack can assert an actionable RFRA claim.

The Supreme Court has held that the RFRA is unconstitutional as applied to state and local governments, *see City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), but RFRA claims "remain viable" against the federal government. *See Jama v. Esmor Corr. Servs. Inc.*, 577 F.3d 169, 172 n.4 (3d Cir. Aug. 12, 2009) (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006)). Under the RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a) (2006). Once the plaintiff establishes a prima facie case, the government must show that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1)(b)(1)–(2). The RFRA does not define the term "substantially burden," but the Third Circuit has held that a substantial burden lies where

> 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Norwood, 249 F. App'x at 271 (citing *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (capitalization in original)).

Here, Mack does not allege how prison officials substantially burdened the exercise of his religion. Mack does not claim that Defendants forced him to choose between following his religion and forfeiting benefits otherwise available to him, nor does Mack claim that Defendants pressured him to modify his religious behavior. Instead, Mack states in his amended complaint that Defendants provided him with "a suitable area to pray during breaks" when his prayers overlapped with work hours. (*See* Doc. No. 22, Am. Compl. ¶ 32). Mack also states that Defendants "insured [sic] that non pork or halal (lawful) products were made available to [M]uslim and [J]ewish inmates alike for purchase from the commissary." (*Id.* ¶ 33). After carefully reviewing Mack's amended complaint, the Court finds that Mack cannot assert an actionable claim under the RFRA because Defendants did not substantially burden his religious exercise.

ii. Potential Free Exercise Claim

In Mack's memorandum in opposition to Defendants' motion to dismiss (Doc. No. 42), Mack argues that he need not show Defendants "substantially burdened" his religious exercise because Defendants intentionally harassed him. Such an argument gives rise to a potential free exercise claim under *Bivens*, although Mack does not assert one in his amended complaint. The Court will nevertheless consider the merits of such a claim.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). The distinction between these levels of scrutiny is that, to "survive strict scrutiny, a challenged government action must be narrowly tailored to advance a compelling government interest, whereas rational basis review requires merely that the action be rationally related to a legitimate government objective." *Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 165 n.24. When the government intentionally discriminates against religious exercise, no balancing test is necessary; rather, "strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Id.* at 165 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 542 (1993)).

To assert a valid free exercise claim, Mack must show that government actors intentionally discriminated against his religious exercise. Mack has failed to do so. To support his free exercise argument, Mack cites *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846 (3d Cir. 1994), in which the Third Circuit held that a "substantial burden" analysis is inappropriate in cases involving the "intentional burdening of religious exercise." *Id.* at 849. But unlike the government actors in *Brown v. Borough of Mahaffey*, who intentionally impeded individuals from practicing their religion,[7] Defendants in this

[7] The defendants in *Brown* intentionally erected a gate to block access to "tent revival meetings." 35 F.3d at 848. Plaintiffs had to park their automobiles outside the gate and walk 100 to 200 feet to reach the tent. The trial court found that plaintiffs failed to show a "substantial burden" on their religious exercise, as required by the RFRA. *See id.* The Third Circuit, however, stated that "[t]he 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence, and codified in the . . . [RFRA], in order to balance the tension between religious rights and valid government goals advanced by 'neutral and generally applicable laws.'" *Id.* at 849. The "substantial burden" analysis is inappropriate when government actors

case did not prevent Mack from exercising his religious beliefs. Mack does not state that Defendants denied him the opportunity to pray, to eat foods of his choosing, to congregate with inmates of similar belief, to read religious texts, or to choose any other method of exercising his religious beliefs. Instead, Mack states in his amended complaint that Defendants permitted him to attend "Jumah (Friday) services," they provided him a "suitable area to pray" during work, and they made available "halal (lawful) products" in the commissary. (Doc. No. 22, Am. Compl. ¶¶ 31–33). Accordingly, Mack cannot assert an actionable free exercise claim under *Bivens*.

VI. CONCLUSION

For the reasons enumerated above, the Court finds that Mack has failed to state a claim upon which relief can be granted. To be clear, the Court in no way condones or finds acceptable the alleged conduct of Defendant Venslosky. Rather, if the alleged conduct did occur, prison officials should have addressed this conduct in a personnel action aimed at improving professional standards for prison employees. But for reasons already stated, the Court will grant Defendants' motion (Doc. No. 36) and dismiss Mack's amended complaint (Doc. No. 22) with prejudice.[8] An appropriate order follows.

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intentionally discriminate against religious exercise because this action serves no legitimate purpose. *Id.* In cases where the government intentionally impedes plaintiff's religious activity, therefore, plaintiffs may assert a free exercise claim regardless of whether the claim fits under the RFRA.

[8] The Court notes that Mack was granted leave to amend on April 12, 2012 (*see* Doc. No. 21) and that Mack filed an amended complaint on May 5, 2012 (Doc. No. 22). Permitting another curative amendment in this case would be futile in that amendment would not cure the deficiencies.

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

CHARLES MACK,	)	
	)	
Plaintiff,	)	**CIVIL ACTION NO. 3:10-264**
	)	
v.	)	**JUDGE KIM R. GIBSON**
	)	
JOHN YOST, *Warden*; TIM KUHN, *Associate Warden*; JEFF STEVENS, *Trust Fund Officer*; D. VESLOSKY, *Correctional Officer*; and DOUG ROBERTS, *Correctional Officer*,	)	
	)	
Defendants.	)	

ORDER

AND NOW, this 24th day of October, 2013, upon consideration of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 36), and for the reasons set forth in the accompanying memorandum, **IT IS HEREBY ORDERED** that Defendants' motion to dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's amended complaint (Doc. No. 22) is **DISMISSED** with prejudice, and the Clerk of Court is directed to **CLOSE** this case.

BY THE COURT:

Kim R. Gibson

KIM R. GIBSON
UNITED STATES DISTRICT JUDGE

Charles Mack, Reg. No. 51900-066
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

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

CHARLES MACK,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 3:10-264
	)	
v.	)	JUDGE KIM R. GIBSON
	)	
JOHN YOST, *Warden*; TIM KUHN,	)	
Associate Warden; JEFF STEVENS,	)	
Trust Fund Officer; D. VESLOSKY,	)	
Correctional Officer; and DOUG	)	
ROBERTS, *Correctional Officer*,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiff Charles Mack's motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) (ECF No. 45). Mack seeks reconsideration of the Court's previous judgment of October 24, 2013, entered at ECF Number 44.

I.

A motion filed pursuant to Fed. R. Civ. P. 59(e) primarily serves to correct analytical errors in a prior decision of the court. *See United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003). Under Rule 59(e), "a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 606 (M.D. Pa. 2002) (citation omitted).

II.

Mack first challenges the Court's ruling with respect to his equal protection claim. The Court found that, to the extent Mack implicitly raised an equal protection claim, it was meritless because he had not identified any similarly situated individuals whom prison officials treated differently. (ECF No. 44 at 9). Mack argues that he should have had an opportunity to amend his complaint to cure this deficiency. (ECF No. 45 at 3).

As discussed in the Court's previous ruling, "Fifth Amendment equal protection claims are examined under the same principles that apply to such claims under the Fourteenth Amendment." *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316–17 (3d Cir. 2001). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike" under the law. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Its purpose is to prevent "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

In the context of an equal protection claim that "implicates constitutionally protected rights such as the free exercise of religion," a district court must initially determine "whether a constitutional violation has occurred." *Riley v. Snyder*, 72 F. Supp. 2d 456, 460 (D. Del. 1999). Here, the Court previously determined that Mack could not assert a valid free exercise claim or any other constitutional claim. Similarly, Mack is not challenging the express terms of a statute or prison regulation, nor is he asserting that prison officials administered any statute or regulation in a discriminatory manner. In light of these deficiencies, dismissal of this claim is warranted, and permitting leave to amend would be futile.

The Court recognizes that, in its previous decision, it could have expounded on this equal protection issue further. For the reasons now stated, in addition to those reasons provided in the Court's previous decision at ECF Number 44, the Court will deny Mack's motion to alter or amend judgment with respect to his equal protection claim.

III.

Mack next disagrees with the Court's finding that an informal oral complaint to a prison guard is not constitutionally protected conduct for purposes of a First Amendment retaliation claim. The Third Circuit tasked this Court with "consider[ing] this issue in the first instance." 427 F. App'x at 72. The Court considered the issue as a matter of first impression, carefully reviewing related cases from this Circuit and elsewhere. (ECF No. 44 at 10). The Court finds that the reasoning in its previous decision is sound and that its legal conclusion is consistent with federal constitutional law.

The Court also finds that Mack's citations to *Pearson v. Welborn*, 471 F.3d 732, 741 (7th Cir. 2006), and 28 C.F.R. § 542.13(a) are unavailing. *Pearson* involved a markedly different set of factual circumstances, rendering it easily distinguishable from this case. Similarly, 28 C.F.R. § 542.13(a) was implemented through a *written* informal resolution process with prison staff (*see* ECF No. 38-3 at 10), not through an informal oral complaint procedure. Accordingly, Mack has not shown any error of law, and his motion to alter or amend judgment will be denied with respect to his retaliation claim.

IV.

Mack further argues that the Court erred in finding that he could not assert a valid free exercise claim. Although Mack never raised a *Bivens* free exercise claim, the Court nevertheless considered whether such a claim could survive a motion to dismiss. In the instant motion, Mack states that he is not claiming that he has been "prevented from practicing his religious beliefs in some way." (ECF No. 45 at 6). Such a showing is necessary for a valid free exercise claim based on the intentional impediment of religious exercise. *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 850 (3d Cir. 1994). Specifically, Mack must show that prison officials "intentionally impeded" his religious activity. *Id.* In this case, however, Mack is not asserting that claim. Accordingly, the Court will deny Mack's motion to alter or amend judgment with respect to his free exercise claim.

V.

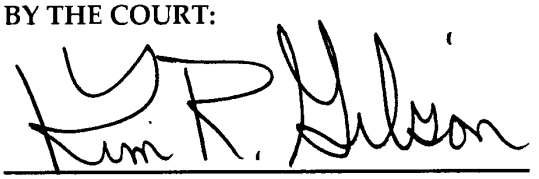
As a final matter, Mack filed the instant motion under Fed. R. Civ. P. 59(e). Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Rule 6(b) states that the Court "must not extend the time to act" under Rule 59(e). *See also Smith v. Evans*, 853 F.2d 155, 161 (3d Cir. 1988) (describing this deadline as "unwaivable"). The Court entered its previous decision on October 24, 2013. Mack filed his Rule 59(e) motion on November 25, 2013, four days beyond the mandatory time limit. Because Mack is a *pro se* prisoner litigant, however, the Court has considered Mack's Rule 59(e) motion regardless of its timeliness.

VI.

The Court previously reviewed Mack's amended complaint to determine whether he has stated, or by amendment could state, any "cognizable claims." *Mack v. Yost*, 427 F. App'x 70, 73 (3d Cir. 2011). The amended complaint was reviewed *de novo* and was liberally construed. The Court found that Mack's amended complaint did not state a claim upon which relief could be granted. The Court now concludes that Mack has not shown any grounds to support his motion to alter or amend judgment (ECF No. 45), and the motion is therefore **DENIED**. This case remains closed.

SO ORDERED this 3rd day of April, 2014.

BY THE COURT:



KIM R. GIBSON
UNITED STATES DISTRICT JUDGE