

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

DARREN HARCUM,	:	
Plaintiff,	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 06-5326
JOHN SHAFFER et al.	:	
Defendants.	:	
	:	

**MEMORANDUM AND ORDER**

YOHN, J. November \_\_\_\_\_, 2007

This civil rights suit arises out of a prisoner’s claim that prison officials wrongly confiscated his legal materials. Plaintiff Darren Harcum, a prisoner of the Pennsylvania Department of Corrections (“DOC”), filed this 42 U.S.C. § 1983 action against fourteen current and former DOC officials who work or worked in facilities throughout Pennsylvania. Defendants include four officials at the State Correctional Institution (“SCI”) at Chester: Captain James Spagnoletti, ex-Lieutenant Michael Tooley, Officer Marco Giannetti, and ex-Officer Michael Minor; four officials at SCI-Mahoney: Captain Gerald Gavin, School Principal Patricia Ramer, Librarian Mary Jane Hesse, and Assistant Librarian Donna Roman; Lieutenant John Moyer at SCI-Graterford; and DOC Executive Deputy Secretary John Shaffer.<sup>1</sup>

Defendants’ presently move to dismiss the complaint. For the reasons discussed below, the court will grant defendants’ motion in part and deny it in part.

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<sup>1</sup> Plaintiff has agreed to withdraw his claims against ex-Superintendent Martin Dragovich, Superintendent Edward Klem, Officer Kurt Coons, and Officer Rex Bonds. (*See* Pl.’s Resp. at 6.)

## I. Background

As alleged in the complaint,<sup>2</sup> on November 16, 2005, while plaintiff was incarcerated at SCI-Chester, Officers Minor and Giannetti searched his cell. (Compl. § IV ¶ 2.) During the search, they reviewed, separated, stacked, and confiscated 400 to 450 pages of plaintiff's legal materials (Compl. § IV ¶ 2), including his federal habeas corpus petition, his entire file documenting his pending Pennsylvania Post-Conviction Relief Act ("PCRA") appeal dating to May 2004, and his copies of provisions of the Uniform Commercial Code ("UCC") and related information (Compl. § IV ¶ 8). After plaintiff protested this seizure of his materials, Officer Giannetti informed plaintiff that he was just following orders. (Compl. § IV ¶ 3.) Officer Giannetti then provided plaintiff with a non-itemized confiscation form. (Compl. § IV ¶ 3.)

That night, plaintiff submitted administrative grievance No. 135847, detailing the above events. (Compl. § IV ¶ 4.) The following morning, plaintiff met with Lieutenant Tooley and Captain Spagnoletti regarding his grievance. (Compl. § IV ¶ 6-7.) Lieutenant Tooley had read the confiscated legal papers, and Captain Spagnoletti informed plaintiff that he would review the papers to make a decision about the grievance. (Compl. § IV ¶ 8.)

Subsequently, on November 22, 2005, Officers Coons and Bonds searched and "trashed" plaintiff's cell, for "personal" reasons, at the request of "Big Dog" (i.e., Captain Spagnoletti). (Compl. § IV ¶ 9.) They then restrained plaintiff and took him to Captain Spagnoletti's office. (Compl. § IV ¶ 9-10.) Two state troopers awaited plaintiff there and informed him that prison officials were allowed to confiscate his materials. (Compl. § IV ¶ 10.)

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<sup>2</sup> Because this is a motion to dismiss, the court accepts the facts that plaintiff alleges in the complaint and supporting documentation as true. *See Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996); *Lum v. Bank of Am.*, 361 F.3d 217, 222 (3d Cir. 2004).

The troopers then departed, and Captain Spagnoletti informed plaintiff that he had read the papers and was returning most of them to plaintiff. (Compl. § IV ¶ 10.) Captain Spagnoletti stated, however, that he would hold the remainder of the papers for further study. (Compl. § IV ¶ 13.) Plaintiff refused to receive any of the papers unless all were returned. (Compl. § IV ¶ 10.) Lieutenant Tooley then entered the office, and Captain Spagnoletti told plaintiff that if he refused the papers, he would see to it that plaintiff's pre-release application was denied, as well as his eligibility for parole or outside work detail. (Compl. § IV ¶ 12.) At this point, Lieutenant Tooley produced an initial grievance response form. Plaintiff asked what the document was, to which Lieutenant Tooley responded, "You want to go home when the time comes, right?" (Compl. § IV ¶ 13.) Plaintiff signed the document, which withdrew his administrative grievance. (Compl. § IV ¶ 13.) Captain Spagnoletti then returned most of plaintiff's legal papers, but he retained the remainder for consultation with Lieutenant Moyer.<sup>3</sup> (Compl. § IV ¶ 13.)

On March 8, 2006, plaintiff was transferred to SCI-Graterford. On April 2, 2006, plaintiff filed an administrative request for his legal documents with a property sergeant. (Compl. § IV ¶ 14.) On April 8, 2006, plaintiff received most of his legal papers, but he noticed some documents were missing, including those related to his prior habeas corpus petition, his UCC information, and his pending PCRA appeal. (Compl. § IV ¶ 14-15.) Plaintiff then filed grievance No. 149508. (Compl. § IV ¶ 15.) After the initial response and permitted appeals, this grievance was resolved against plaintiff.

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<sup>3</sup> The court infers from these facts and plaintiff's requested relief that these documents have not been returned to him.

Without the aid of his legal documents, plaintiff filed briefs in his pending PCRA appeal. He prepared his brief in response to the District Attorney's Office's brief, which was due on May 12, 2006. Plaintiff filed his response "without the benefit of consulting his prior records to aide [sic] in his preparation" and "basically had to file his response brief from memory." (Compl. § IV.B.B 10.) Although plaintiff notified the Superior Court of his situation, the court nonetheless denied his appeal on July 20, 2006. (Compl. § IV.B.B 10.) Plaintiff then sought permission from the Third Circuit to file a subsequent petition for habeas corpus, but could not complete his application because defendants had confiscated his prior habeas petition, which is a required component of the application. (Compl. § IV.B.B 10.)

On August 29, 2006, after plaintiff was transferred to SCI-Mahoney, he sent legal papers to the library staff, including Assistant Librarian Roman, for photocopying. (Compl. § V ¶ 1.) The papers included a seven-page affidavit, a four-page power of attorney, and a one-page UCC information search request seeking provisions of the UCC as enacted and codified in the Pennsylvania Consolidated Statutes. (Compl. § V ¶ 1.) After one week, plaintiff had not received his materials and thus requested information on their whereabouts and about his request for the UCC statutory provisions. Librarian Hesse informed defendant that his documents and request had been forwarded for a review of their propriety. On September 12, 2006, plaintiff filed grievance No. 163261, demanding the return of his papers. (Compl. § V ¶ 3.) On September 14, 2006, Principal Ramer notified plaintiff that his papers would be returned. (Compl. § V ¶ 4.) On September 20, 2006, however, Librarian Hesse "officially confiscated" plaintiff's legal documents and denied plaintiff's request for the UCC sections. (Compl. § V ¶ 3.) Between October 16 and 27, 2006, still without his papers, plaintiff wrote to defendants

Principal Ramer, Captain Gavin, and Superintendent Klem, requesting the return of his papers. (Compl. § V ¶ 4.)

As part of his efforts, plaintiff challenged the DOC's policy, ordered by Secretary Shaffer, that labeled the UCC as contraband. (Compl. § V ¶ 5.) The policy allegedly barred plaintiff from possessing or accessing the UCC as codified in the Pennsylvania Consolidated Statutes.<sup>4</sup>

Plaintiff then filed this complaint on December 4, 2006. Although the court ordered the Clerk to contact the Prisoner Pro Se Civil Rights Panel on March 13, 2007 to request an attorney to volunteer to represent plaintiff, those efforts have thus far been unsuccessful. Plaintiff is, therefore, proceeding pro se. Defendants filed their pending motion to dismiss on May 11, 2007.<sup>5</sup> Plaintiff sought substantial additional time to respond to the motion, and the court stayed the action for a period of time at his request.

## **II. Discussion**

### **A. Plaintiff's Claims**

Plaintiff asserts a number of claims under 42 U.S.C. § 1983. Section 1983 provides a remedy for deprivation of rights established under the constitution or federal law by a person acting under the color of state law. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To state a claim under § 1983, plaintiff must allege (1) the violation of a right secured by the Constitution

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<sup>4</sup> As recently as September 27, 2007, plaintiff requested clarification of the scope of the ban on UCC-related materials through an official prison request form. He specifically questioned: "Is UCC statute considered contraband?" On October 2, 2007, Security Lieutenant Datchko responded "Per Executive Deputy Sec. Shaffer- We are ordered to confiscate any material concerning the UCC." (Pl.'s Mot. for Allowance of Attached Addendum, Oct. 15, 2007, Ex. F.)

<sup>5</sup> Parties exchanged additional supplements and responses, although much of the information contained in these pleadings is beyond the scope of the court's current review.

or laws of the United States, and (2) that the alleged constitutional deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Plaintiff alleges the following claims. Against defendants at SCI-Chester and SCI-Graterford, plaintiff alleges violations of his rights to equal protection, court access, privacy, procedural due process, and freedom of speech and expression,<sup>6</sup> and of his right to be free from cruel and unusual punishment. In addition, plaintiff claims that Lieutenant Tooley and Captain Spagnoletti denied him procedural due process and retaliated against him for exercising his constitutional rights. Against the SCI-Mahoney defendants, plaintiff alleges violations of his procedural due process rights, and, with respect to the SCI-Mahoney defendants and Secretary Shaffer, violations of his rights to freedom of speech and expression and equal protection.<sup>7</sup>

Plaintiff sues all defendants in their personal and official capacities. The complaint requests injunctive relief, including the return of his legal documents; a declaration that DOC's policy deeming the UCC to be contraband is unconstitutional; disciplinary action against Lieutenant Tooley, Captain Spagnoletti, and the individuals involved in stealing or withholding his property; reimbursement of the costs of suit; and nominal, compensatory, and punitive damages.

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<sup>6</sup> Because the plaintiff is proceeding pro se, the court will interpret the complaint and plaintiff's responses to extend the First Amendment allegations to SCI-Chester defendants.

<sup>7</sup> Because the plaintiff is proceeding pro se, the court will interpret the complaint, plaintiff's responses, and amended response to extend the equal protection allegations to SCI-Mahoney defendants and Secretary Shaffer.

B. Eleventh Amendment

The court will first address defendants' challenge to its jurisdiction. The court lacks jurisdiction over plaintiff's claims for damages against officials in their official capacities because the Eleventh Amendment bars suits against the state. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This acts as "a jurisdictional bar which deprives federal courts of subject matter jurisdiction." See *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984)). The Supreme Court has interpreted the Amendment to protect a state from "suit in federal court by its own citizens as well as those of another state." *Pennhurst*, 465 U.S. at 100. This conclusion applies equally to bar suit against state officials in their official capacities. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

"Such immunity, however, may be lost in one of two ways: (1) if the Commonwealth waived its immunity; or (2) if Congress abrogated the States' immunity pursuant to a valid exercise of its power." *Lavia v. Pennsylvania*, 224 F.3d 190, 195 (3d Cir. 2000). Pennsylvania has not waived its immunity. See 42 Pa. Cons. Stat. § 8521(b) (providing that "[n]othing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States"). Likewise, Congress did not abrogate Eleventh Amendment sovereign immunity when it enacted § 1983. See *Quern v. Jordan*, 440 U.S. 332, 345 (1979). Thus, because the DOC is part of Pennsylvania's executive branch, a plaintiff may not maintain a § 1983 claim

against it or its officials. *See Lavia*, 224 F.3d at 195 (concluding that “[b]ecause the Commonwealth of Pennsylvania’s Department of Corrections is a part of the executive department of the Commonwealth, . . . it shares in the Commonwealth’s Eleventh Amendment immunity” (citing 71 Pa. Cons. Stat. § 61)). The court, therefore, lacks jurisdiction to consider plaintiff’s claims for damages against defendants in their official capacities and will dismiss all such claims with prejudice.<sup>8</sup>

C. Exhaustion of State Remedies

Defendants contend that the court cannot consider plaintiff’s claims based on the November 2005 cell search because plaintiff failed to exhaust available administrative remedies.<sup>9</sup> Under the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a),<sup>10</sup> a prisoner must exhaust all available administrative remedies before bringing a § 1983 claim. A plaintiff’s failure to avail himself of any available administrative remedy prevents review in federal court. *See Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004). Because failure to exhaust administrative

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<sup>8</sup> The court will consider plaintiff’s claims for injunctive relief and plaintiff’s claims against defendants in their individual capacity because the Eleventh Amendment does not bar these suits. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *Koslow v. Pennsylvania*, 302 F.3d 161, 168 (3d Cir. 2002).

<sup>9</sup> Defendants do not raise failure to exhaust as a defense to any of plaintiff’s other claims.

<sup>10</sup> 42 U.S.C. § 1997e(a) provides:

No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), 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.

remedies is an affirmative defense, defendants carry the burden of proof. *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002).<sup>11</sup>

“The availability of administrative remedies to a prisoner is a matter of law.” *Id.* at 291. The available remedies are found in the state’s prison grievance procedures, and “compliance with prison grievance procedures . . . is all that is required by the PLRA to ‘properly exhaust.’” *Jones v. Bock*, 127 S. Ct. 910, 922-23 (2007). The DOC has a three-stage grievance process. *See Spruill*, 372 F.3d at 232. The process includes the initial review, the appeal to a facility manager, and the appeal to the Secretary’s Office of Inmate Grievances and Appeals. *Id.*

In this case, after filing a grievance and completing the initial review, plaintiff signed a form withdrawing his grievance. (Compl. § IV ¶ 13.) Plaintiff, therefore, did not exhaust the three-stage process. Notwithstanding this withdrawal, plaintiff argues that because he signed under duress, he exhausted all remedies made available to him.

This court must determine whether, as a matter of law, withdrawal of a grievance under duress is an exception to the rule requiring exhaustion of prison administrative remedies. Neither the parties nor I have identified any Supreme Court or Third Circuit precedent directly on point. In *Nyhuis v. Reno*, however, the Third Circuit rejected a futility exception to the exhaustion requirement because “[o]ur bright-line rule is that inmate-plaintiffs must exhaust all available administrative remedies.” *Nyhuis v. Reno*, 204 F.3d 65, 75 (3d Cir. 2000). To the contrary, in *Brown v. Croak*, the Third Circuit found that plaintiff exhausted available administrative remedies where security officers told plaintiff that “he must ‘wait until this investigation was

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<sup>11</sup> Failure to exhaust administrative remedies may be raised on a Rule 12(b)(6) motion because it is often “an insuperable barrier to recovery by the plaintiff.” *Ray*, 285 at 295 n.8 (citing *Flight Sys., Inc. v. Elec. Data Sys. Corp.*, 112 F.3d 124, 127 (3d Cir. 1997)).

complete before filing a formal grievance.’’ 312 F.3d 109, 111 (3d Cir. 2002). The court reached this conclusion because § 1997e(a) only requires that prisoners exhaust such administrative remedies “as are available,” not all administrative remedies. *Id.* at 113. The court required further discovery because “[d]efendants ha[d] not met their burden of proving the affirmative defense of failure to exhaust remedies.” *Id.* at 111. The facts as alleged in this case are closer to *Brown* than *Nyhuis*. Taking this plaintiff’s allegations as true, by threatening plaintiff with opposition to his future prerelease application, parole, or outside work detail if he did not withdraw his grievance, defendants interfered with his use of the grievance system and removed the availability of further administrative remedies. Furthermore, the court cannot yet conclude that defendants have met their burden as articulated in *Brown* to prove that plaintiff failed to exhaust available remedies because, despite their conclusory claim to the contrary, defendants have not yet shown that plaintiff could have appealed a withdrawn grievance.

#### D. Constitutional Violations

Defendants also move dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for plaintiff’s failure to allege any constitutional violation on which the court may grant relief under § 1983. Generally, when deciding whether to dismiss a claim pursuant to Rule 12(b)(6), the court is testing the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The court must accept as true all well-pled allegations of fact in the plaintiff’s complaint, and any reasonable inferences that may be drawn therefrom, to determine whether “under any reasonable reading of the pleadings, the plaintiff[] may be entitled to relief.” *Nami*, 82 F.3d at 65. “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer

evidence to support the claims.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (internal quotation marks and citation omitted). Courts will grant a motion to dismiss “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Furthermore, “[a] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (internal quotation marks omitted).

1. *Equal Protection / Discrimination*

Plaintiff claims that he was discriminated against because he was involved in studying the UCC and referenced the UCC in his criminal appeal.<sup>12</sup> (See Compl. § IV.B.A 8-9; Pl.’s Resp. 11.) The Equal Protection Clause of the Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” The essence of the equal protection guarantee embodied in the Fourteenth Amendments is “that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Its purpose “is to secure every person . . . against 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) (per curiam). In *Olech*, the Supreme Court explained that, regardless of the size of the class

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<sup>12</sup> To the extent that plaintiff raises violations of his rights to access the courts and to freedom of speech and expression in this section of his complaint, those rights are governed by distinct legal standards that will be considered in separate sections.

discriminated against, a plaintiff, even an individual, alleges a violation of the Equal Protection Clause by claiming that he “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.* In the Third Circuit, “it is clear that, at the very least, to state a claim under that theory, a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment.” *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006).

According to plaintiff, he was the only prisoner whose pending criminal appeals were confiscated based on the UCC regulation. (*See* Compl. § IV.A 9 (“No other inmate is subject to have [sic] his legal papers and court documents taken simply for studying or possessing the law as promulgated and legislated by the law making authority.”).) Furthermore, plaintiff asserts in his amended response that he was the only prisoner not able to access the UCC, naming another inmate, Chris Brown, who was permitted to access the UCC. (Pl.’s Amend. Resp. Br. 1.) The court will interpret these allegations as invoking the “class of one” theory.

As for the first *Hill* criterion, plaintiff has identified at least one similarly situated prisoner who was allowed access to the UCC, and the court will liberally interpret the complaint to assert that other prisoners who had documents retained under the UCC policy were nonetheless allowed to keep unrelated court filings. With regard to the second *Hill* criterion, plaintiff undoubtedly alleges that defendants intentionally acted by confiscating his papers and by denying him access to the UCC statutes while not doing so for other prisoners, which is sufficient for purposes of this motion to dismiss. *See Olech*, 528 U.S. at 565 (concluding that allegations of similarly situated owners and an irrational demand by defendants “quite apart from the

[defendant's] subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"). Finally, for the third criterion, although many factual issues will be clarified during future proceedings, neither studying and citing the UCC in the criminal appeal nor requesting UCC statutory provisions appears to be a rational basis for retaining plaintiff's unrelated legal documents. The court will, therefore, deny defendants' motion to dismiss with regard to plaintiff's equal protection claim.

## 2. *Access to Court*

Plaintiff alleges that the confiscation of some of his legal materials on or before April 8, 2006 violated his right of access to the courts.<sup>13</sup> Prisoners have a fundamental right of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Bounds v. Smith*, 430 U.S. 817, 821, 828 (1977); *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995). Confiscation of legal material may violate the right to access where it actually interferes with a nonfrivolous attack on the plaintiff's conviction or civil rights action. *See Christopher v. Harbury*, 536 U.S. 403, 415-416 (2002); *Lewis*, 518 U.S. at 353 n.3, 354; *Zilich v. Lucht*, 981 F.2d 694, 696-97 (3d Cir. 1992). To state a claim, a defendant must allege the merits of "the underlying cause of action and its lost remedy" in his complaint. *Christopher*, 536 U.S. at 416. The court will then analyze the underlying claim to ensure that "the nature of the underlying claim is more than hope." *Id.*

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<sup>13</sup> Plaintiff alleges at least three incidents in which defendants confiscated his legal papers. The only incident that he argues directly impacted his ability to file a claim in his criminal appeal was the confiscation of his papers on April 8, 2006 after he was transferred to SCI-Graterford. Plaintiff's contention that Lieutenant Tooley and Captain Spagnoletti interfered with his access to court for his present civil rights claim is mooted because the court has concluded that plaintiff did not fail to exhaust his administrative remedies based on the current record; therefore, plaintiff can show no injury.

In this case, plaintiff alleges that defendants deprived him of the ability to properly file a reply brief for his pending PCRA appeal to the Pennsylvania Superior Court because he had to write from memory and did not have documents to aid in his preparation. Additionally, after plaintiff's PCRA appeal was denied, he could not complete his application with the Third Circuit seeking leave to file a second habeas petition because his prior petition, which he was required to submit with his renewed application, had been confiscated. (Compl. IV.B 10.) Plaintiff offers no detail regarding the merits of his underlying PCRA appeal. Without those details, the court is unable to ensure that the claim was nonfrivolous. Because plaintiff carries the burden to plead an arguable underlying claim, plaintiff's allegation that his PCRA petition was confiscated and that, therefore, he cannot recall the actual claims he would have made, is not sufficient. The court will grant defendants' motion to dismiss plaintiff's right of access to court claim without prejudice, granting plaintiff leave to amend his complaint, if possible, to allege a nonfrivolous attack on his underlying conviction.

### 3. *Procedural Due Process Claims*

Plaintiff claims that defendants violated his right to due process after confiscation of his legal papers on three occasions. A procedural due process claim requires a two-step inquiry: (1) whether the complaining party has a protected liberty or property interest, and (2) whether the process afforded the prisoner comports with constitutional requirements. *See, e.g., Shoats v. Horn*, 213 F.3d 140, 143-44 (3d Cir. 2000). Undoubtedly, plaintiff's papers were his property. *See Parratt v. Taylor*, 451 U.S. 527, 529-30 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

When depriving prisoners of their property, prison officials must provide prisoners an opportunity to be heard at a meaningful time and in a meaningful manner in order to comport with due process requirements. *Id.* at 540-41. Postdeprivation remedies grant prisoners that opportunity and satisfy due process requirements. *Id.* at 544; *see also Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984). Generally, DOC’s grievance procedures provide adequate postdeprivation remedies. *E.g., Tillam v. Lebanon County Corr. Facility*, 221 F.3d 410, 422 (3d Cir. 2000). Yet, as courts have noted, “[p]risoners are not constitutionally entitled to a grievance procedure[,] and the state creation of such a procedure does not create any federal constitutional rights.” *Wilson v. Horn*, 971 F. Supp. 943, 947 (E.D. Pa. 1997), *aff’d*, 142 F.3d 430 (1998); *see also Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), *cert. denied*, 514 U.S. 1022 (1995); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988); *Shango v. Jurich*, 681 F.2d 1091, 1100 (7th Cir. 1982). Therefore, plaintiff may maintain a due process claim not for the problematic grievance procedure itself, but instead only to the extent that the procedure’s shortcomings injured his due process rights to protest the underlying confiscation.

In this case, plaintiff asserts three independent procedural due process violations. First, plaintiff asserts that Lieutenant Tooley and Captain Spagnoletti deprived him of his due process rights when they threatened him and, thereby, coerced him into signing a form withdrawing his grievance. If true, plaintiff has not been provided with procedural due process to protest the confiscation of his property.<sup>14</sup>

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<sup>14</sup> Defendants have not directed the court to other state-based remedies available to plaintiff to satisfy due process requirements.

Second, plaintiff alleges that when he was transferred to SCI-Graterford, defendants departed from the typical confiscation process by taking his legal materials without providing a confiscation receipt. He did, however, receive postdeprivation process when he filed his grievance. Plaintiff's grievance was denied, and he completed his appeals process within the prison. His unfettered use of the grievance process dispels his claim that defendants violated his due process rights.

Third, plaintiff asserts that Principal Ramer and other SCI-Mahoney defendants violated his due process rights by refusing to return his legal papers after concluding that they were not contraband. Defendants have not responded to this allegation. Under the facts as alleged, the administrative grievance process vindicated plaintiff's rights by determining his materials were not contraband and, therefore, should have been returned to plaintiff. These documents were not, however, returned. Therefore, this allegation will survive the motion to dismiss to allow development of the factual record. In sum, the court will grant defendants' motion to dismiss plaintiff's claims regarding the confiscation of his property at SCI-Graterford but will deny defendants' motion regarding the grievance processes at SCI-Chester and SCI-Mahoney.

#### 4. *Right to Privacy*

Plaintiff claims a violation of his right to privacy. A prisoner does not have a reasonable expectation of privacy in his cell and property. *See Hudson*, 468 U.S. at 530. Plaintiff has failed to allege any reasonable expectation of privacy in the contents of his cell or legal papers; therefore, the court will grant defendants' motion to dismiss plaintiff's right to privacy claims.

## 5. *Retaliation*

Plaintiff also asserts that Lieutenant Tooley and Captain Spagnoletti retaliated against him after he declared his intent to pursue a federal claim against corrections officials involved in the confiscation of his legal papers. To state an actionable claim for retaliation, a prisoner-plaintiff must prove that (1) the conduct which led to the alleged retaliation was constitutionally protected, (2) he suffered some adverse action that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) the constitutionally protected conduct was a substantial or motivating factor in the decision to take adverse action. *Rausser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001).

In this case, plaintiff alleges that his announcement of his intent to pursue his claim in his administrative complaint form was a protected activity satisfying the first element. Plaintiff is correct. Once he announced his intent to pursue legal recourse, defendants were prohibited from retaliating against him. *Cf. Anderson v. Davila*, 125 F.3d 148, 163 (3d Cir. 1997) (holding in an employment retaliation case that the plaintiff was protected from retaliation when he notified the defendants of his intent to sue, even though he “had not yet filed his lawsuit”). To satisfy the second element, plaintiff alleges that defendants undertook the adverse action of coercing him to forego his administrative complaint by threatening to prevent his early release, parole, or assignment to outside work detail. This allegation is legally sufficient to constitute an adverse action because it prevented him from resolving his claim administratively, even though it did not legally result in his failure to exhaust available administrative remedies for purposes of this

lawsuit.<sup>15</sup> See *Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000) (holding that “[r]etaliatio[n] may be actionable . . . even when the retaliatory action does not involve a liberty interest”). Plaintiff satisfies the third element by alleging that prior to their actions against him, Lieutenant Tooley and Captain Spagnoletti had knowledge of his intent to pursue a claim and were motivated to prevent it. (Compl. § VI .A 15-16 (asserting that plaintiff’s intent to pursue legal recourse was announced in his original complaint, that defendants had knowledge of the exhaustion requirement, and that they had a retaliatory motivation).) For purposes of establishing causation, such evidence of “suggestive temporal proximity” is relevant. *Rausser*, 241 F.3d at 334; see also *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (concluding for a pro se plaintiff that “the word ‘retaliation’ in his complaint sufficiently implies a causal link”). For the purposes of this motion to dismiss, such allegations are sufficient to allege a cause of action for retaliation, and the court will deny defendants’ motion to dismiss the retaliation claim.

#### 6. *Cruel and Unusual Punishment*

Plaintiff claims a violation of his right to be free from cruel and unusual punishment. The Eighth Amendment requires that the government “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994). For example, “prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates.” *Id.* Despite plaintiff’s claims of cruel and

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<sup>15</sup> Whether the adverse actions alleged here would have deterred a person of ordinary firmness from exercising his constitutional rights is a question best left to the trier of fact, especially where defendants have not claimed that the alleged actions fail to satisfy minimal requirements. See *Cooper v. Beard*, No. 06-0171, 2006 WL 3208783, at \*12 (E.D. Pa. Nov. 2, 2006) (citing cases).

unusual punishment, he fails to allege any facts constituting cruel or unusual punishment; therefore, the court will grant defendants' motion to dismiss these claims.

7. *Free Speech and Expression*

Plaintiff alleges that DOC's policy of confiscating UCC materials violates his First Amendment right to freedom of speech and expression. "[I]mprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the *First Amendment*." *Banks v. Beard*, 126 S. Ct. 2572, 2577 (2006); *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). "But at the same time the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere." *Banks*, 126 S. Ct. at 2577-78. "[R]estrictive prison regulations are permissible if they are reasonably related to legitimate penological interests . . . and are not an exaggerated response to such objectives." *Id.* at 2578.

*Turner* provides four factors relevant to the reasonableness of a prison regulation. 482 U.S. at 89-90. The Third Circuit has split those four criteria into a two-step test to review the regulation. *See Jones v. Brown*, 461 F.3d 353, 360 (3d Cir. 2006). First, to find a prison regulation constitutional, the court must find that it is rationally connected to the legitimate, neutral governmental interest put forward to justify it. *Id.* at 360; *see also Turner*, 482 U.S. at 89. Second, to "pass *Turner*'s 'overall reasonableness' standard," *DeHart v. Horn*, 227 F.3d 47, 53 (2000) (en banc), the court must analyze the three other *Turner* factors, including a prisoner's alternative means to exercise his rights, the impact or burden that accommodating the rights will have on prison guards, other inmates, and prison resources, and ready alternatives to the

regulation that accommodate both penological interests and prisoner rights. *Jones*, 461 F.3d at 360.

Recently, in *Monroe v. Beard*, No. 05-4937, 2007 WL 2359833, at \*17 (E.D. Pa. Mar. 7, 2007), a court in this district granted summary judgment in a similar case, concluding that the DOC's policy banning UCC materials was constitutional under *Turner*. Defendants ask this court to adopt a similar holding in the current motion to dismiss. Although *Monroe* lends support to the assertion that the policy is reasonable and rationally related to a legitimate penological interest in preventing fraudulent UCC filings put forward as justification by defendants, the allegations of this complaint may raise facts unique to the present plaintiff. The court cannot conclude at this time that this regulation passes both steps of the *Turner* test, particularly its overall reasonableness in application to plaintiff. A few examples from the complaint illustrate unique legal issues.<sup>16</sup> According to the complaint, the DOC's regulation violates his First Amendment right to freedom of speech and expression because it bans all UCC-related materials, including the UCC statute itself, and, as applied to plaintiff, prevented him from possessing other legal materials because they mentioned the UCC's statutory provisions. Plaintiff alleges that his confiscated papers had nothing to do with UCC forms that are typically used in fraudulent filings. Yet, defendants allegedly prevented plaintiff from accessing his materials and non-contraband UCC provisions as codified in Pennsylvania's statutes, despite his protests that they were for legitimate use, raising an issue of whether he was treated in a way that

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<sup>16</sup> The court in *Monroe* recognized that it is difficult to "apply the fact-intensive *Turner* test on a motion to dismiss." 2007 WL 764086, at \*13 (citing *Ramirez v. Pugh*, 379 F.3d 122, 128, 130 (3d Cir. 2004)).

did not comply with the regulation. These factual allegations are sufficient to survive a motion to dismiss.<sup>17</sup>

E. Personal Involvement

Ex-Superintendent Dragovich, Superintendent Klem, Officer Coons, Officer Bonds, and School Principal Ramer argue that plaintiff cannot maintain a claim under against them § 1983 because they were not personally involved in the alleged activities. To state a claim under § 1983, a plaintiff must show that the defendant official was personally involved in constitutional wrongdoing. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). This can be accomplished in two ways: through allegations of personal direction or of actual knowledge and acquiescence. *Id.* Liability cannot be predicated solely on the operation of respondeat superior. *Id.*

Plaintiff agrees to withdraw his § 1983 claims against Superintendent Dragovich, Superintendent Klem, Officer Bonds, and Officer Coons. (*See* Pl.'s Resp. at 6.) Plaintiff, however, refuses to withdraw his claim against Principal Ramer. Plaintiff alleges that Principal Ramer unlawfully retained his legal documents after she deemed them not to be contraband. (Pl.'s Resp. at 6.) Accepting plaintiff's allegations and supporting documentation as true, Principal Ramer had actual knowledge that plaintiff's materials had not been returned and either acquiesced or participated in failing to return them. She will, thus, remain a party to the case at this junction.

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<sup>17</sup> The court will not consider defendants' factual evidence to the contrary at this time, for doing so would convert the present motion into a motion for summary judgment. *See Camp v. Brennan*, 219 F.3d 279, 280 (3d Cir. 2000).

F. Compensatory Damages

Plaintiff seeks compensatory damages against some of the defendants, ranging from \$25,000.00 each from Officer Giannetti, Secretary Shaffer, Lieutenant Moyer, and Officer Minor to \$50,000.00 each from Lieutenant Tooley and Captain Spagnoletti. “[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986). “[T]he basic purpose of § 1983 damages is to *compensate persons for injuries* that are caused by the deprivation of constitutional rights.” *Id.* at 307 (internal quotation marks omitted). Section § 1983 claims for compensatory damages thus require “actual injury.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). “To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . , personal humiliation, and mental anguish and suffering.” *Stachura*, 477 U.S. at 307 (internal quotation marks omitted). Section 1997e(e) of the PLRA,<sup>18</sup> however, bars mental and emotional damages in prisoner litigation absent physical injury. *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000).

Citing *Al-Hafeez*, Defendants argue that the only plausible way to read plaintiff’s complaint is based on mental or emotional injury, and that because plaintiff’s claims involve no physical injury, he is barred from seeking compensatory damages under section 1997e(e). Defendants are correct that plaintiff has not alleged physical injury to this point, but neither has he confined his claims to mental or emotional injury. Noting that plaintiff is proceeding pro se,

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<sup>18</sup> Section 1997e(e) provides: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”

the court cannot at this time conclude that the only plausible reading of his complaint is for mental or emotional injury; therefore, the court will allow plaintiff to pursue compensatory damages, if he can prove actual injury, in future proceedings.

### **III. Conclusion**

As explained above, defendants' motion to dismiss will be granted in part and denied in part. Under the Eleventh Amendment, the court lacks jurisdiction to adjudicate claims against these defendants in their official capacities, so the court will grant defendants' motion to dismiss those claims, except as to possible injunctive relief. The court will deny defendants' motion to dismiss based on plaintiff's failure to exhaust administrative remedies and with regard to plaintiff's § 1983 claims for equal protection violations, retaliation, denials of procedural due process at SCI-Chester and SCI-Mahoney (including the allegations against Patricia Ramer), and infringement of First Amendment rights. The court will grant defendants' motion to dismiss plaintiff's § 1983 claims based on violations of the right to court access, to privacy, to procedural due process with regard to events at SCI-Graterford, and to be free from cruel and unusual punishment. In addition, Officer Bonds, Officer Coons, Superintendent Dragovich, and Superintendent Klem will be dismissed from the case with plaintiff's consent. Plaintiff may continue to maintain an action for compensatory damages against the remaining defendants, but will carry the burden of proving specific compensable injury in future phases of the litigation.

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

DARREN HARCUM,  
Plaintiff,

v.

JOHN SHAFFER et al.  
Defendants.

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: CIVIL ACTION  
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: NO. 06-5326  
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**ORDER**

YOHN, J.

**AND NOW** on this \_\_\_\_\_ day of November, 2007, upon consideration of defendants' motion to dismiss (Docket No. 16) and supplemental motions (Docket Nos. 33 & 40), and plaintiff's responses thereto (Docket Nos. 28, 34, 38 & 41), **IT IS HEREBY ORDERED** that:

1. Defendants' motion to dismiss plaintiff's claims against all defendants in their official capacities because the court lacks jurisdiction under the Eleventh Amendment is **GRANTED**. Plaintiff's claims against defendants in their official capacities are **DISMISSED** with prejudice, except as to possible injunctive relief.

2. Defendants' motion to dismiss plaintiff's due process claim is **GRANTED** regarding events at SCI-Graterford, and plaintiff's claim based on this theory is **DISMISSED** with prejudice.

3. Defendants' motion to dismiss plaintiff's access to court claim is **GRANTED**. Plaintiff's complaint based on this theory is **DISMISSED** without prejudice, and plaintiff is **GRANTED** leave to amend his complaint with respect to this claim.

4. Defendants' motion to dismiss plaintiff's privacy and cruel and unusual punishment claims is GRANTED. These claims are DISMISSED with prejudice.

5. By consent of plaintiff, defendants Rex Bonds, Kurt Coons, Martin Dragovich, and Edward Klem are DISMISSED as parties to this case.

6. The balance of defendants' motion to dismiss is DENIED.

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William H. Yohn Jr., Judge