

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JONATHAN F. BOOTH,

*

Plaintiff,

*

v.

*

Civil Action No.: RDB 05-1972

MARYLAND DEPARTMENT OF
PUBLIC SAFETY & CORRECTIONAL
SERVICES, *et al.*,

*

*

Defendants.

*

* * * * *

MEMORANDUM OPINION

Plaintiff Jonathan Booth (“Plaintiff” or “Booth”) brought this action against his former employer, the Maryland Department of Public Safety and Correctional Services (“the Department”) and Warden James Peguese (“Warden Peguese”) (collectively, “Defendants”), alleging violations of his Maryland constitutional rights, violations of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. §§ 2000e, *et seq.*, and common law breach of contract. The case presently before this Court is a consolidated action, comprising Plaintiff’s original Complaint against both the Department and Warden Peguese, 05-1972 (“2005 Complaint”), and Plaintiff’s subsequent Complaint naming only the Department, 06-2529 (“2006 Complaint”). Two counts from each Complaint remain and can be broken down as follows: Count II (breach of the settlement agreement) and Count III (Article 36 of the Maryland Declaration of Rights) from the 2005 Complaint, and Count III (Title VII - hostile work environment) and Count IV (Title VII - retaliation) from the 2006 Complaint.¹

¹ The 2005 Complaint and 2006 Complaint contain nearly identical factual allegations. All references to documents filed with this Court are papers docketed in the 2005 Complaint

Pending before this Court is Defendants' Motion for Summary Judgment (Paper No. 106) as to the remaining four counts. On June 12, 2008, this Court held a motions hearing on the pending motion. For the reasons stated below, Defendants' Motion for Motion for Summary Judgment is GRANTED.

BACKGROUND AND PROCEDURAL HISTORY

The facts are viewed in a light most favorable to Plaintiff Jonathan Booth as the nonmoving party.² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). As a result of previous litigation instituted by Booth in this Court,³ Booth entered into a settlement agreement with the Department's Division of Pretrial Detention and Services ("DPDS") that resulted in Booth's promotion from Correctional Officer II (Corporal) to a Correctional Officer III (Sergeant) and transfer to the Department's Division of Correction ("DOC") at the Maryland House of Correction - Annex ("MHC-X").⁴ The settlement agreement provided, in relevant part, as follows:

Mr. Booth will be promoted from Correctional Officer II to Correctional Officer III, effective September 1, 2003. Mr. Booth will be transferred from the [DPDS] to the [DOC], preferably to a facility within the Baltimore region.

(RDB-05-1972), the lead case in this consolidated action.

² The background of this case was also discussed at length in this Court's prior Memorandum Opinions, in which this Court granted Defendants' Motion to Dismiss Count I of the 2005 Complaint (Paper No. 40) and denied Plaintiff's Motion for Reconsideration (Paper No. 52).

³ See generally *Booth v. Maryland*, 207 F. Supp. 2d 394 (D. Md. 2002), *aff'd in part and rev'd in part*, 327 F.3d 377 (4th Cir. 2003) ("*Booth I*"). A brief summary of the disposition of *Booth I* was provided in an earlier Memorandum Opinion issued by this Court (Paper No. 40), and need not be repeated herein.

⁴ The MHC-X is now known as the Jessup Correctional Institution.

Mr. Booth will receive a religious accommodation to dress code policy of [the Department]. The Department agrees that it will not retaliate against Mr. Booth for filing the above referenced lawsuits in any fashion.

This agreement does not prevent, in any way, the Department from otherwise disciplining Mr. Booth if he engages in misconduct under Department's Standards of Conduct or under the Code of Maryland Regulations governing misconduct of state personnel. This agreement also does not preclude the DOC from assigning Mr. Booth to any shift or any appropriate post within its correctional facilities.

(Defs.' Mot. Summ J. Ex. 1, Attach. A.)

I. Booth's Appointment and Removal From the Acting Lieutenant Position

After Booth was transferred and assumed his new position as Sergeant, Warden Peguese assigned Booth to an acting lieutenant position on July 1, 2004, upon the recommendation of Booth's supervisors. Although Warden Peguese had the authority to assign Booth to the position of acting lieutenant, *see* Code of Maryland Regulations (COMAR) 17.04.02.06C(1) (allowing appointing authority, under certain circumstances, to "designate an employee to perform temporary duties in a classification for which the rate of pay is higher than that of the employee's classification"), there is no genuine dispute that an employee was required to take the correctional lieutenant's examination and score best qualified to be permanently promoted to lieutenant.⁵

On October 12, 2004, Warden Peguese issued a written "Counseling Record" to Booth

⁵ Booth offers the deposition testimony of two employees who claim that, to their knowledge, individuals have been assigned in the past to the acting lieutenant positions without having taken the examination, but then took the examination to achieve permanent status. Contrary to Plaintiff's contention, this testimony does not contradict the undisputed fact that Booth never took the correctional lieutenant's examination (Booth Dep. 63), and therefore was not eligible for the permanent lieutenant position.

for “fail[ing] to take the necessary corrective actions” after noticing what appeared to be feces on the floor of the “B” building of MHC-X on October 8, 2004. Also, according to Defendants’ submissions, Warden Peguese removed Booth from the acting lieutenant position because the same supervisors who originally recommended him eventually disapproved of his performance and because of an inappropriate relationship with a subordinate female officer. As to Booth’s work performance, Captain Theresa Dorn testified that Booth “was careless in his work and inaccurate,” that “most of the time [she] had to take stuff back to him and have him do it over again,” and that Booth’s duty assignment sheets were “often . . . carelessly done, his numbers were incorrect, [n]ames were missing or they were on twice, or they weren’t on at all, or they were on the front and back of the sheet.” (Defs.’ Mot Summ J. Ex. 8, Dorn Dep. 25.) Bruce Washington, a former lieutenant, testified that Booth’s work “was a little spotty at times” and that he “[p]aid no attention.” (*Id.* at Ex. 9, Washington Dep. 34-35.) Major Citrine Warren testified that “after a certain time frame . . . you expect [Booth] to be a little bit more independent, and he really wasn’t showing that.” (*Id.* at Ex. 6, Warren Dep. 75-76.) Booth admitted that Major Warren had expressed his concerns because “a couple times . . . [Booth’s] figures were off.” (*Id.* at Ex. 3, Booth Dep. 61.)

Defendants have also offered evidence that Booth’s supervisors believed he was involved in an inappropriate relationship with a subordinate female officer, Angela Ellis. Major Warren testified that he personally noticed the close relationship between Booth and Ms. Ellis. (*Id.* at Ex. 6, Warren Dep. 77, 82.) Plaintiff denies this relationship and Major Warren admitted that he never personally noticed any romantic overtures. (*Id.*)

Major Warren testified that Booth was giving Ms. Ellis favorable treatment. For

example, other lieutenants complained to Major Warren that after they completed schedules, Booth switched Ms. Ellis's schedule to her liking. (*Id.*) After Major Warren approached Booth about the subject, Booth's behavior did not change. (*Id.*) As a result, Major Warren recommended to the Security Chief (who reports to Warden Peguese) that Booth be removed from the Acting Lieutenant position.

Plaintiff contends that, contrary to Defendants' assertions, he did not give preferential treatment to Ms. Ellis, and in fact reprimanded her for excessive absences.⁶ (*See* Pl.'s Resp. Ex. 22.) Defendants counter that the report prepared by Booth was created at Major Warren's behest and was not of Booth's own volition. (Pl.'s Resp. Ex. 21.)

According to Defendants, Warden Peguese elected to remove Booth on November 17, 2004, from the acting lieutenant position as a result of Booth's unsatisfactory job performance and after consulting with Major Warren about the relationship between Booth and Ms. Ellis.

II. Incidents Preceding Booth's Termination

As this Court previously noted in a prior Memorandum Opinion (Paper No. 40), Booth requested a meeting with Warden Peguese months after being removed from the acting lieutenant position to discuss the possibility of reclaiming the position. Booth testified that he met with Warden Peguese on February 4, 2005, and that Warden Peguese told him that "[then-Secretary Mary Ann Saar of the Department] would not allow somebody to be in [the] position of . . . lieutenant that's wearing dreadlocks. [Warden Peguese] didn't put it in a manner that was [in] his viewpoint He didn't specifically tell me that the [S]ecretary specifically

⁶ The memorandum Plaintiff submits in support of his argument is dated September 16, 2004, the date of the Ms. Ellis's first absence, which Plaintiff states was his own mistake.

said anything to him. But he told me that the [S]ecretary liked short haircuts.” (Defs.’ Mot. Summ. J., Ex. 3, Booth Dep. 49-50.) Booth sent a follow-up email to Warden Peguese, in which he told Warden Peguese that he “enjoy[ed] communicating” with him, “appreciate[d] you allowing me correspondence [sic] with you,” and informed him that “I will attempt to wear my hat in a manner that will not draw attention to my locked hair,” to which the Warden corresponded, “[a]ll is well, but the decision is yours.” (Pl.’s Opp’n Mot. Dismiss Ex. A.) Booth testified further that “Warden Peguese has never said it to me, he wasn’t going to allow me to wear my hair [in] any particular manner.” (Defs.’ Mot. Summ. J. Ex. 3.)

On February 25, 2005, Booth wrote another email to Warden Peguese stating that “I have come up with a way to totally hide my locked hair. Can I have my bars back,” to which the Warden responded, “No thanks your hair has nothing to do with it.” (Defs.’ Reply Supp. Mot. Dismiss Ex. 1, Att. B.)

In February 2005, Warden Peguese placed MHC-X on lock down status because of acts of violence perpetrated by MHC-X inmates. On February 28, 2005, Booth was assigned as the Officer in Charge and he made several rounds on the wing. He did not notice anything unusual about inmate Stefan Bell’s cell that evening — Booth states that the inmate appeared to be relaxing and watching television. On February 28 or the early morning of March 1, however, inmate Bell died in his cell.

On the morning of March 1, 2005, Booth opened five cell doors at a time so that food trays could be placed in the inmates’ cells. Despite entering inmate Bell’s cell, he did not notice inmate Bell “doing anything but watching his television” when he entered the cell. (Defs.’ Mot. Summ J. Attach. D.) At approximately 8:15 a.m. that morning, another correctional officer

realized inmate Bell was unresponsive. A subsequent attempt at revival was unsuccessful.

After an investigation of the incident and a pre-disciplinary mitigation conference, Warden Peguese terminated Booth's employment on March 17, 2005, for opening multiple cell doors at the same time and for failing to notice the death of an inmate while being the Officer in Charge, in violation of the State Personnel and Pensions Article of the Maryland Code, the Code of Maryland Regulations, and the Department's Standards of Professional Conduct. Two other correctional officers in addition to Booth were found to be at fault for the incident — Correctional Officer Akinbobola was terminated, and Correctional Officer Olowe offered his resignation, which Warden Peguese accepted.

On April 4, 2005, Warden Peguese sent a letter to another supervisor that stated that 'it is . . . true that I referenced [Booth] wearing his dread[locks] under his cap and off his collar as required. Again Sgt. Booth advised that it was not an infringement on his beliefs and that he was willing to do that.' (Pl.'s Resp. Ex. 6.)

III. Administrative Findings and Judicial Appeal

Booth appealed his termination with the Office of Administrative Hearings (OAH). An administrative hearing was held over four days at the OAH before Administrative Law Judge Veronica P. Jones ("ALJ Jones"). On December 27, 2005, in a 28-page decision, ALJ Jones affirmed the Notice of Termination filed against Booth and concluded that Booth violated a Maryland statutory provision (Md. Code Ann., State Pers. & Pen. §11-105 (1)(iii) (conduct that seriously threatens the safety of the workplace)), administrative regulations (COMAR 17.04.05.04.B (1) (negligence in the performance of duties), (2) (intentional misconduct), (3) (conduct that if publicized would bring State into disrepute), and (12) (insubordination)), and

several internal Department policies (Standards of Conduct 50-2 Section II B.1 (personal conduct), II.J (performance of duties), II.K (insubordination), II.M (breach of security), IV E.1.a.5 (unsatisfactory job performance), IV.E.2.a.9 (insubordination) and IV.E.2.a.18 (negligent performance of duties)). Consequently, the termination was upheld.

Booth then appealed to the Circuit Court for Baltimore City, which, on June 19, 2006, affirmed the OAH decision after a hearing. On July 14, 2007, the Court of Special Appeals of Maryland affirmed the Circuit Court (in an unreported opinion), and the Court of Appeals of Maryland denied *certiorari* on December 7, 2007.

IV. Procedural History In This Case

Booth brought three counts in his 2005 Complaint (05-1972) against the Department and Warden Peguese. In Count I, Booth asserted claims under 42 U.S.C. § 1983, alleging that the stated reasons for his termination were pretextual, and that the real reason for his termination was his failure to remove his dreadlocks and for filing an earlier action to enforce his First Amendment right to exercise his religious freedom. In Count II, Booth alleged that Defendants' actions breached the settlement agreement of Booth's prior lawsuit. In Count III, Booth asserted that the Defendants' actions violated his rights under Article 36 of the Maryland Constitution's Declaration of Rights. On January 5, 2006, Defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (Paper No. 24), which this Court granted in part and denied in part (Paper No. 40). Count I was dismissed, while Counts II and III from the 2005 Complaint remain pending.

After Booth filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and received a right to sue letter, Booth then filed the 2006 Complaint

(06-2529) in this Court on September 26, 2006, against the Department, alleging four violations of Title VII. In Count I, Booth alleged that the Department failed to accommodate his religious beliefs. In Count II, Booth alleged he was disparately treated on the basis of his religion. In Count III, Booth alleged that he was subject to a hostile work environment. In Count IV, Booth alleged that he was retaliated against for bringing earlier claims against his employer. After conducting a hearing, this Court issued an Order on August 24, 2007, granting the motion as to Counts I and II, but denying the motion as to Counts III and IV. (Paper No. 84.)

On December 5, 2006, the two cases were consolidated pursuant to this Court's Order (Paper No. 54), with case RDB-05-1972 designated as the lead case. On January 3, 2007, the Department filed the pending Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. (Paper No. 106.) On April 30, 2008, Plaintiff filed a Response (Paper No. 113) and, on May 16, 2008, Defendants filed their Reply (Paper No. 116).

STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court of the United States explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-

minded jury could return a verdict for the [nonmoving party] on the evidence presented.” *Id.* at 252.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom “in the light most favorable to the party opposing the motion,” *Matsushita*, 475 U.S. at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *see also E.E.O.C. v. Navy Federal Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005). The opponent, however, must bring forth evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). “Once the movant has established the absence of any genuine issue of material fact, the opposing party has an obligation to present some type of evidence to the court demonstrating the existence of an issue of fact.” *Pension Ben. Guar. Corp. v. Beverley*, 404 F.3d 243, 246-47 (4th Cir. 2005) (citing *Pine Ridge Coal Co. v. Local 8377, UMW*, 187 F.3d 415, 422 (4th Cir. 1999)). Rule 56(e) also requires that “affidavits submitted by the party defending against a summary-judgment motion contain specific facts, admissible in evidence, from an affiant competent to testify, ‘showing that there is a genuine issue for trial.’” *Id.* (quoting 10B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2740, 399 (3d ed. 1998)). The mere existence of a “scintilla” of evidence in support of the nonmoving party’s case is not sufficient to preclude an order granting summary judgment. *Anderson*, 477 U.S. at 252.

This Court has previously held that a “party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences.” *Shin v. Shalala*, 166 F. Supp. 2d 373, 375 (D. Md. 2001) (citations omitted). Indeed, this Court has an affirmative obligation to prevent factually unsupported claims and defenses from going to trial. *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th

Cir. 1987)).

DISCUSSION

I. Breach of the Settlement Agreement

Count II of the 2005 Complaint contends that the Department breached the settlement agreement from a prior lawsuit by removing Plaintiff from the acting lieutenant position and by subsequently terminating his employment. The settlement agreement explicitly provided (1) that Plaintiff would be transferred and promoted,⁷ (2) that Plaintiff would “receive a religious accommodation to [the] dress code policy of the Department,” and (3) that the Department was not prevented, “in any way,” from disciplining Plaintiff if he engaged in misconduct under the Department’s Standards of Conduct or under the Code of Maryland Regulations governing misconduct of state personnel.

Plaintiff is unable to demonstrate that the Department did not provide him with a religious accommodation to the dress code policy. The policy at issue requires correctional staff to maintain short hairstyles. (Defs.’ Mot Summ. J. Ex. 14.) The plain language of the settlement agreement provided for a religious accommodation to wear dreadlocks, which, in the prior litigation leading up to the settlement agreement, this Court has noted were “braided, short and kept tucked neatly against Booth’s scalp.” *Booth I*, 207 F. Supp. 2d 394, 396 (D. Md. 2002), *aff’d in part and rev’d in part*, 327 F.3d 377 (4th Cir. 2003). Although Plaintiff contends that the settlement agreement was breached because Warden Peguese “asked [Booth] to wear his hair above his collar,” (Pl.’s Resp. 3), he readily admits that the previous litigation resulted in a

⁷ The parties are in agreement that Defendant complied with this portion of the settlement agreement.

settlement “by which [he] was granted a religious exemption from the grooming policy, namely, the right to wear his hair in dreadlock fashion.” (*Id.*) On the record before this Court, Plaintiff established only that Warden Peguese asked him to wear his dreadlocks above his collar. Plaintiff has not offered any evidence suggesting that wearing dreadlocks above the collar violated his religious tenets,⁸ nor has he offered evidence that he was asked to remove his dreadlocks altogether. By its terms, therefore, the settlement agreement barred the Department from making Plaintiff cut off his dreadlocks, but did not bar the Department from requiring Plaintiff to wear his dreadlocks above the collar.

More importantly for the purposes of Plaintiff’s allegation, the settlement agreement clearly provided that the Department was not prevented, “*in any way,*” from disciplining Plaintiff if he engaged in misconduct. The settlement agreement did not require the Department to appoint Plaintiff to the acting lieutenant position, and likewise did not prevent the Department from removing him for unsatisfactory performance. The Department has submitted the uncontradicted testimony of several individuals that demonstrates that Plaintiff was not adequately performing his duties as acting lieutenant. The Department has also offered evidence that Plaintiff was giving preferential treatment to a female subordinate with whom he had a close relationship.

In terms of his ultimate termination, Plaintiff has already extensively argued that he did not violate the Code of Maryland Regulations or the Department’s Standards of Conduct in an

⁸ Indeed, Plaintiff submitted an affirmation in response to Defendants pending motion in which he stated that “in accordance with the tenets of my religion, [I] wore, and continue to wear, dreadlocks which are braided and twisted, and *tied up so as not to interfere with my uniform or security equipment.*” (Pl.’s Resp. Ex. 2 (emphasis added).)

administrative hearing. After a hearing, ALJ Jones concluded in a written opinion that the Department properly fired Plaintiff for violating Md. Code Ann., State Pers. & Pens. § 1111-105(1)(iii), COMAR 17.04.05.04B(1), (2), and (12), and several of MHC-X's Standards of Conduct. ALJ Jones's findings were upheld in both the Circuit Court for Baltimore City and the Court of Special Appeals, and the Court of Appeals eventually denied *certiorari*. As this Court has previously noted during the course of this litigation, administrative findings that are upheld in the state court system are established as a matter of law. *See Harris v. Md. House of Correction*, 209 F. Supp. 2d 565, 571 (D. Md. 2002) ("The outcome of [the State administrative and judicial] proceedings establishes as matter of law that plaintiff's misconduct as a correctional officer was the sole reason for the termination of her employment."). Plaintiff may not relitigate in a federal forum issues argued and rejected in state court.⁹

Because Plaintiff has not demonstrated that the Department did not provide a religious accommodation, and because the settlement agreement expressly permitted the actions taken by the Department in this case, Defendants' Motion for Summary is GRANTED as to Count II of the 2005 Complaint.

II. Article 36 of the Maryland Declaration of Rights

Count III of the 2005 Complaint alleges that both the Department and Warden Peguese

⁹ Plaintiff argues quite extensively that the underlying administrative hearing was tainted because (1) Warden Peguese testified falsely and (2) ALJ Jones credited testimony that she should have discredited and discredited testimony that she should have credited. Plaintiff had the opportunity to attack witness credibility and present witnesses and evidence at the administrative proceeding. These issues are not now susceptible to collateral attack in federal court, especially since Plaintiff is currently pursuing on appeal in state court the OAH's denial of these same arguments in his "Motion for Revision and New Trial."

violated Plaintiff's rights under Article 36 of the Maryland Declaration of Rights,¹⁰ the state constitutional analogue to the Free Exercise Clause of the First Amendment to the United States Constitution.

Defendants argue first that this Court must grant judgment in their favor because Article 36 does not provide for a private cause of action. Defendants note that "this Court has twice called into question whether a private cause of action exists for a violation of Article 36 of the Maryland Declaration of Rights." (Defs.' Mem. Supp. Summ J. 17); *see Booth v. Maryland*, 207 F. Supp. 2d 394 (D. Md.2002) ("It is not clear that Maryland law provides a private right of action for damages under [Article 36]"); *Baird v. Haith*, 724 F. Supp. 367, 371 (D. Md. 1988) ("There is no indication in Maryland law that there is any private right of action for damages under [Article 36]"). Counsel for the Defendants informed this Court that research has not uncovered a single Maryland case recognizing a private cause of action under Article 36.¹¹

This Court discussed Defendants' argument in a Memorandum Opinion issued on Plaintiff's Motion for Reconsideration (Paper No. 52). In that opinion, this Court determined

¹⁰ Article 36 of the Maryland Declaration of Rights provides in relevant part:

That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights

¹¹ Despite the apparent lack of a specific case on point, counsel stated at the hearing that, by all indications, the Court of Appeals appears to be leaning towards recognizing such a cause of action.

that “Defendants have not presented sufficient grounds for concluding that Article 36 of the Maryland Declaration of Rights does *not* give rise to a private cause of action.” (Mem. Op. 11.) Noting that “Maryland law is unclear on this point,” this Court stated that “neither party has undertaken anything more than a cursory analysis with respect to whether Article 36 authorizes a private cause of action” and that an appropriate analysis would “consider, among other topics, whether Article 36 is self-executing, establishes individual rights, imposes a duty on the government, and provides an express remedy.” (*Id.* at 11-12.)

Such an analysis has not been undertaken by the parties and this Court is not in a position to rule, one way or the other, whether Article 36 provides a private cause of action to Plaintiff in this case. In any event, this issue is better suited for resolution by the Maryland courts given their expertise on state constitutional issues.

This Court is not prevented from deciding the pending motion even though it stops short of determining whether Article 36 provides a private a cause of action. Assuming for the present purposes alone that Article 36 does provide a provide cause of action, Maryland courts have repeatedly decided cases on the assumption that the free exercise provision of Article 36 is in *pari materia* with the First Amendment. *See Supermarkets General Corp. v. State*, 409 A.2d 250, 258 (Md. 1979); *Stover v. Prince George’s County*, 752 A.2d 686, 695 (Md. Ct. Spec. App. 2000) (proceeding “on the basis that, in the context of this case, the two constitutional provisions have the same effect”).

This Court has previously held in this case, in the context of affirming the grant of qualified immunity to Warden Peguese on Plaintiff’s Motion for Reconsideration of that decision (Paper No. 52), that “Plaintiff’s allegations, if true, would not substantiate the violation of his

rights under the Free Exercise Clause [of the First Amendment].” (Mem. Op. 8 (denying Booth’s motion for reconsideration on Count I of the 2005 Complaint).) This Court has also previously granted Defendants’ Motion to Dismiss on Plaintiff’s Title VII religious accommodation claim (Count I of the 2006 Complaint) because Plaintiff had failed to establish that “(1) he or she has a *bona fide* religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.” *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)).

At that time those decisions were rendered, Plaintiff had not demonstrated that he had a *bona fide* religious belief that conflicted with the Department’s dress code policy. As discussed above, nothing submitted by Plaintiff in the interim has convinced this Court that the Department or Warden Peguese required or requested that Plaintiff cut his dreadlocks in contravention of his religious beliefs. In short, Plaintiff has not persuaded this Court that his Article 36 claim, assuming a private cause of action exists, should be treated any differently than his previous contentions in this Court. Indeed, at the hearing conducted on Defendants’ pending motion, Plaintiff’s counsel conceded that there is no meaningful difference between the claims this Court has already dismissed and the claim under Article 36.

Therefore, Defendants’ Motion for Summary Judgment is GRANTED as to Count III of the 2005 Complaint.

III. Hostile Work Environment

Count III of the 2006 Complaint alleges that the Department violated Booth’s rights

under Title VII by subjecting him to a hostile work environment.

In order to show that he suffered from a hostile or abusive work environment, Plaintiff must demonstrate that he was harassed and that the harassment was “(1) unwelcome, (2) because of religion, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer.” *See Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007) (citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183-84 (4th Cir. 2001)).

In *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2008), the United States Court of Appeals for the Fourth Circuit recently discussed at length the third element of a hostile work environment claim. The court noted first that the “severe or pervasive” element “has both subjective and objective components,” *id.* at 315 (citing *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333 (4th Cir. 2003) (en banc)), and that, in terms of the objective component of that element, courts should look “‘at all the circumstances,’ including ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance,’” *Sunbelt Rentals*, 521 F.3d at 315 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)). The court then explained that

plaintiffs must clear a high bar in order to satisfy the severe or pervasive test. Workplaces are not always harmonious locales, and even incidents that would objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life. Thus, complaints premised on nothing more than “rude treatment by [coworkers],” *Baqir v. Principi*, 434 F.3d 733, 747 (4th Cir. 2006), “callous behavior by [one’s] superiors,” *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003), or “a routine difference of opinion and personality conflict with [one’s]

supervisor,” *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 276 (4th Cir. 2000), are not actionable under Title VII.

The task then on summary judgment is to identify situations that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion.

Sunbelt Rentals, 521 F.3d at 315.

On the record here, Plaintiff is hard pressed to point to any incidents constituting harassment under Title VII, let alone such “severe or pervasive” harassment warranting relief under the statute. Although Plaintiff claims that Warden Peguese “created a situation wherein the Plaintiff’s hair style was not acceptable and he could not be promoted without removing his dreadlocks,” (Pl.’s Resp. 31), Plaintiff can point to, at most, only a few isolated instances where his hair was even discussed. The first (and primary) instance is the February 4, 2005 conversation between Plaintiff and Warden Peguese, in which Warden Peguese allegedly informed Plaintiff that the Secretary wouldn’t allow somebody with dreadlocks to become a lieutenant. This Court remains highly skeptical that this conversation constitutes “intimidation, ridicule, and insult” under Title VII. In any event, standing alone, it most certainly is not so “extreme [as] to amount to a change in the terms and conditions of employment.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The other two instances where Plaintiff’s hairstyle was mentioned are contained in emails. In the first, written in response to his February 4, 2005 meeting with Warden Peguese, Plaintiff wrote that he “enjoy[ed] communicating” with Warden Peguese and that he “appreciate[d] you allowing me correspondence [sic] with you.” (Pl.’s Opp’n Mot. Dismiss Ex. A.) Plaintiff’s reaction is hardly indicative of a hostile workplace. The second email, again written by Plaintiff to Warden Peguese, stated simply that “I have come up with a way to totally

hide my locked hair. Can I have my bars back[?]" Tellingly, Warden Pegeuse responded, "No thanks *your hair has nothing to do with it.*" (Defs.' Reply Supp. Mot. Dismiss Ex. 1, Att. B (emphasis added).) Nothing contained in either email comes remotely close to establishing a hostile work environment under Title VII.

In sum, the record lacks any evidence "that a reasonable jury might find to be so out of the ordinary as to meet the severe or pervasive criterion." *Sunbelt Rentals*, 521 F.3d at 315. Therefore, Defendants' Motion for Summary Judgment is GRANTED as to Count III of the 2006 Complaint.

IV. Retaliation

Count IV of the 2006 Complaint alleges that the Department violated Plaintiff's rights under Title VII by "retaliat[ing] against [Plaintiff] for asserting his right to wear his hair in accordance with his religious convictions." (Pl.'s Resp. 41.)

To establish a *prima facie* claim of retaliation under Title VII, Plaintiff must demonstrate the following: (1) that he engaged in protected activity; (2) that the employer took an adverse action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Matvia v. Bald Head Island Mgmt.*, 259 F.3d 261, 271 (4th Cir. 2001). In *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), the Supreme Court wrote that "[i]n our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (citations omitted).

As to the first element, Plaintiff's claim does not appear to specifically define what

“protected activity” he was engaged in.¹² The 2006 Complaint alleges, in part, that “Plaintiff’s demotion from the [acting lieutenant] position because he would not cut his hair constitutes retaliation on account of protected religious beliefs.” (2006 Compl. ¶ 60.) Plaintiff also states in response to the pending motion that “[Warden] Peguese . . . removed the Plaintiff from the [a]cting [l]ieutenant position because of his hair style.” (Pl.’s Resp. 41.) Plaintiff’s claim fails insofar as he alleges that his religious beliefs, generally speaking, constitute a “protected activity” for purposes of his Title VII retaliation claim.¹³ This formulation is a Title VII disparate treatment claim dressed up as a Title VII retaliation claim, and this Court has already granted Defendants’ Motion to Dismiss Plaintiff’s disparate treatment claim. (Papers No. 84, 94.)

If, however, Plaintiff intends to use his previous lawsuit in *Booth I* as the impetus for his retaliation claim,¹⁴ then his allegations here merge to a large extent with his allegations in the breach of the settlement agreement claim. Therefore, Plaintiff’s Title VII retaliation claim also

¹² The Fourth Circuit has explained that “[p]rotected activities fall into two distinct categories: participation or opposition An employer may not retaliate against an employee for participating in an ongoing investigation or proceeding under Title VII, nor may the employer take adverse employment action against an employee for opposing discriminatory practices in the workplace.” *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998). Opposition activity is defined as “utilizing informal grievance procedures as well as staging informal protests and voicing one’s opinion in order to bring attention to an employer’s discriminatory activities.” *Id.* at 259.

¹³ Moreover, the actions that Plaintiff alleges constituted retaliation—*i.e.*, Plaintiff being removed from the acting lieutenant position and, liberally construing the 2006 Complaint, his ultimate termination—each occurred well before Plaintiff filed any formal legal papers in connection with either of the cases that comprise this consolidated action.

¹⁴ This Court notes that the temporal proximity between the resolution of *Booth I* and Plaintiff’s termination is too attenuated to alone support a retaliation claim under Title VII. *See Mitchell v. Sec’y Veterans Affairs*, 467 F. Supp. 2d 544, 554 (4th Cir. 2006).

fails for many of the same reasons the breach of settlement claim failed.

With respect to Plaintiff being removed from the acting lieutenant position, he is unable to demonstrate that the Defendants' proffered reason is a pretext for retaliation. Plaintiff has not convinced this Court that Warden Peguese's decision to remove Plaintiff was the result of anything other than (1) unsatisfactory work performance and (2) giving preferential treatment to a female subordinate with whom Warden Peguese believed Plaintiff was having an inappropriate relationship.

With respect to Plaintiff's ultimate termination, Plaintiff already litigated in an administrative hearing and through the Maryland state court system whether Defendants stated reason for the termination was false. ALJ Jones concluded that Plaintiff had violated Md. Code Ann., State Pers. & Pens. § 1111-105(1)(iii), COMAR 17.04.05.04B(1), (2), and (12), and several of MHC-X's Standards of Conduct, and the Circuit Court for Baltimore City and the Court of Special Appeals both upheld that conclusion. In a case with very similar facts and legal issues, this Court determined that "[p]reclusive effect in a Title VII case must be given to a state court decision upholding the determination by a state administrative agency that an employee has been discharged for cause." *Harris v. Md. House of Correction*, 209 F. Supp. 2d 565, 571 (D. Md. 2002) (citing *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982)). Therefore, a matter of law, Defendant's decision to terminate Plaintiff was based on valid, nondiscriminatory reasons and was not based on retaliation for *Booth I*.

Thus, Defendants' Motion for Summary Judgment is GRANTED as to Count IV of the 2006 Complaint.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED. A separate Order and Judgment follows.

Dated: June 18, 2008

/s/ _____
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JONATHAN F. BOOTH,

*

Plaintiff,

*

v.

*

Civil Action No.: RDB-05-1972

MARYLAND DEPARTMENT OF
PUBLIC SAFETY & CORRECTIONAL
SERVICES, *et al.*,

*

*

Defendants.

*

* * * * *

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, it is this 18th day of June 2008, hereby ORDERED and ADJUDGED, that:

- a. The Motion for Summary Judgment filed by Defendants Maryland Department of Public Safety and Correctional Services and Warden James Peguese (Paper No. 106) is GRANTED;
- b. Judgment is entered in favor of the Maryland Department of Public Safety and Correctional Services and Warden James Peguese in case number RDB-05-1972; and
- c. Judgment is entered in favor of the Maryland Department of Public Safety in case number RDB-06-2529;
- d. The Clerk of the Court transmit copies of this Order and Judgment and the accompanying Memorandum Opinion to counsel for the parties; and

- e. The Clerk of the Court CLOSE THIS CONSOLIDATED CASE, which is comprised of RDB-05-1972 (lead case) and RDB-06-2529.

/s/
Richard D. Bennett
United States District Judge