IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barry Mallory,	:	
	:	
Appellant	:	
	:	
v.	:	No. 365 C.D. 2014
	:	Submitted: November 21, 2014
C. Stanitis, Culinary Manager 1,	:	
John Kerestes, Superintendent,	:	
Deputy Bickle, Deputy Superintendent,	:	
John Doe, Captain-Shift Commander,	:	
Tritt, Deputy Superintendent, John E.	:	
Wetzel, Secretary of Correction	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: May 5, 2015**

Barry Mallory (Appellant) appeals from an order of the Court of Common Pleas of Schuylkill County sustaining the Preliminary Objections of Appellees C. Stanitis, Robert C. Yarnell, John Kerestes, Deputy Bickle, Captain-Shift Commander John Doe, Deputy Superintendent Tritt and Secretary of Corrections John Wetzel, and dismissing Appellant's Complaint. For the reasons that follow, we affirm the order of the trial court.

I.

Appellant, who has been at all times relevant to this action an inmate in the custody of the Department of Corrections (Department) at the State Correctional Institution at Mahanoy (SCI Mahanoy), alleged as follows:

On November 18, 2010, Appellant requested to leave his job detail in the culinary department of SCI Mahanoy to attend the Islamic Eid feast being held in the facility; Appellant's supervisor "Sarge" denied the request. (Complaint ¶21.) The following day, November 19, 2010, Appellant requested to leave his job detail for Islamic Jumah services, but Sarge again refused to let him leave his duties. (*Id*. ¶23.) Appellant filed grievances related to the denial of the requests to attend the Eid feast and Jumah services that were finally denied by Appellee Wetzel, the Secretary of the Department, on January 28, 2011 and March 15, 2011, respectively. (*Id*. ¶¶22, 24.)

At the time of the requests to attend the religious services, Appellant had been assigned to "a prestigious job detail" cleaning pots, pans and utensils with pay between 24 and 28 cents per hour. (*Id*. ¶¶11, 25.) Shortly after he filed the grievances, however, Appellant was reassigned from the cleaning position to a food service line position within the culinary department which paid 19 cents per hour. (*Id*. ¶25.) On February 17, 2011, while working in the food service line and while one of his grievance appeals was still pending, Appellant was confronted by Appellee Stanitis, Culinary Manager 1, because his pant legs were rolled up above the top of his state-issued boots. (*Id*. ¶¶13, 26.) Appellant informed Stanitis that it was a religious practice, and Stanitis asked the food service line supervisor to dismiss Appellant from his job detail. (*Id*. ¶¶14, 26.)

After being dismissed from his job detail and while being escorted back to his housing unit, Appellant spoke to Appellee Bickle, the Deputy Superintendent at SCI Mahanoy, who informed Appellant that he "cared less" upon being told by Appellant what had transpired. (*Id*. ¶15.) As a result of this incident, Appellant was issued a misconduct report on March 2, 2011 for refusing to obey an order and using abusive, obscene or inappropriate language to or about an employee. (*Id*. ¶27.) Appellant received 30 days of solitary confinement in the Restricted Housing Unit and was dismissed from the food service line position. (*Id*.) Appellant filed a grievance relating to this incident on March 4, 2011, which was dismissed by the Facility Grievance Coordinator. (*Id*. ¶¶16, 17.) Appellant appealed the dismissal of his grievance, which was affirmed by Appellee Kerestes, Superintendent at SCI Mahanoy. (*Id*. ¶18.) Appellant's final appeal was denied by Appellee Wetzel on June 6, 2011. (*Id*. ¶¶19, 20.)

II.

Appellant filed the Complaint in the trial court on May 17, 2013 asserting that the March 2, 2011 misconduct report related to his rolled-up pant legs was fabricated in retaliation for his November 2010 grievances concerning the refusal to allow him to attend the Eid feast and Jumah services. (*Id*. ¶¶15, 26, 28.) Appellant alleges that the misconduct report was flawed because it did not list the names of the staff members who were present when Appellee Stanitis dismissed Appellant from his job detail because his pant legs were rolled up. (*Id*. ¶28.) Appellant further alleges that he was denied the ability to engage in the religious practice of rolling up his pant legs and was discriminated against as a result of Appellees' conduct. (*Id*.)

Appellant asserted the following claims in the Complaint against each of the Appellees in their individual and official capacities: (i) retaliation against Appellant for exercising his constitutional rights based upon Section 1983 of Title 42 of the U.S. Code, 42 U.S.C. § 1983; (ii) a violation of Appellant's rights under the Free Exercise clause of the First Amendment of the U.S. Constitution; (iii) a violation of Appellant's rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5; and (iv) discrimination against Appellant contrary to the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution.[1]

Appellees filed preliminary objections in the nature of a demurrer to the claims brought by Appellant, which the trial court sustained. Regarding the retaliation claim, the trial court concluded that while Appellant may have been exercising his constitutional right by participating in the grievance process, Appellant did not sufficiently plead that the earlier grievances were a substantial or motivating factor for the subsequent misconduct report for disobeying an order to roll down his pant legs and use of offensive or abusive language. To the extent Appellant alleged that the misconduct report was retaliation for Appellant's rolling up of his pant legs, the trial court determined that such a claim would effectively be an appeal of his grievance concerning the misconduct, which does not sufficiently state a retaliation claim under Section 1983. The trial court further concluded that Appellant's dismissal from his cleaning job detail and reassignment

[1] Though Appellant does not explicitly state as such, for the purposes of our review we presume that Appellant's claims for monetary damages for violations of his rights under the First Amendment and Fourteenth Amendment are brought pursuant to Section 1983, which "creates a remedy for violations of federal rights committed by persons acting under color of state law" enforceable in state and federal court. *Smolow v. Hafer*, 959 A.2d 298, 299 n.2 (Pa. 2008) (quoting *Howlett v. Rose*, 496 U.S. 356, 358 (1990)).

to a food service job detail did not constitute retaliation because Appellant had no right to any particular prison job.

The trial court next dismissed Appellant's claim for the violation of his rights guaranteed by the Free Exercise clause of the First Amendment, concluding that while Appellant may have a sincere religious belief that he should not wear garments lower than the middle of his shins based on his faith in Islam, Appellant did not allege that Appellees had engaged in conduct that rose to the level of a constitutional violation. The trial court determined that the Department had a clear interest in monitoring the uniforms of inmates and that Appellant had not alleged that he had requested an accommodation from the uniform requirements for his religious beliefs. The trial court further concluded that the assertion that the misconduct report was based on Appellant's religious conduct was not supported by the facts alleged by Appellant; instead, the Complaint showed that the misconduct was based on Appellant disobeying an order and using abusive language after being approached regarding his pant legs.

The trial court determined that Appellant had insufficiently pled a RLUIPA claim because Appellant had simply alleged a violation of the Department's uniform policy and not alleged that he had requested and been denied an accommodation for his religious practice. Furthermore, the trial court concluded that RLUIPA does not support damages against Appellees in their individual capacities and that the Eleventh Amendment to the U.S. Constitution bars damages against Appellees acting in their official capacities.

Finally, the trial court dismissed Appellant's claim premised on a violation of the Equal Protection clause of the Fourteenth Amendment because

Appellant had not alleged that he was discriminated against as a member of a class.[2] Following the dismissal of the Complaint, Appellant appealed to this Court.

III.

In determining whether preliminary objections in the nature of a demurrer were properly sustained, our standard of review is *de novo* and our scope of review is plenary. *Luke v. Cataldi*, 932 A.2d 45, 49 n.3 (Pa. 2007); *Feldman v. Hoffman*, 107 A.3d 821, 826 n.7 (Pa. Cmwlth. 2014). For the purpose of determining the legal sufficiency of a complaint, we must accept the facts alleged and all reasonable inferences that may be drawn from those facts as true. *Mazur v. Trinity Area School District*, 961 A.2d 96, 101 (Pa. 2008); *Feldman*, 107 A.3d at 826 n.7. Preliminary objections may be sustained only where, based on the facts pleaded, it is clear and free from doubt that the plaintiff will be unable to prove facts legally sufficient to establish a right to relief. *Mazur*, 961 A.2d at 101; *Feldman*, 107 A.3d at 826 n.7. Upon review, we agree with the trial court that, even taken as true, the factual allegations contained in the Complaint were insufficient to support the claims alleged and we accordingly affirm the order of the trial court dismissing the Complaint.

Section 1983 Retaliation

Where an inmate alleges that he was retaliated against for the exercise of constitutional rights in violation of Section 1983, the complaint must contain allegations that (i) the inmate engaged in constitutionally protected conduct; (ii)

[2] The trial court also sustained the preliminary objection by Appellees Yarnell, Kerestes and Bickle asserting that the Section 1983 claims against them should be dismissed because Appellant had not alleged that they were personally involved in the deprivation of his constitutional rights. Because of our resolution of Appellees' other preliminary objections, we do not reach this issue.

prison officials took adverse action; (iii) the protected conduct was a substantial or motivating factor for the action; and (iv) the retaliatory action did not further a legitimate penological interest. *Yount v. Pennsylvania Department of Corrections*, 966 A.2d 1115, 1120 (Pa. 2009); *Richardson v. Wetzel*, 74 A.3d 353, 357 (Pa. Cmwlth. 2013).

Here, we conclude that Appellant has satisfactorily pled the first two elements of a retaliation claim. Appellant alleges that he engaged in two incidents of constitutionally protected conduct: filing of grievances in November 2010 related to not being able to attend the Eid feast and Jumah services and rolling up his pant legs above his boots on February 17, 2011. Appellant has clearly alleged that rolling up his pant legs was a religious practice connected to his Islamic faith. (Complaint ¶¶13, 26.) Furthermore, this Court has held that the filing of a grievance against prison staff is protected conduct under the First Amendment right of access to the courts. *Bush v. Veach*, 1 A.3d 981, 985 (Pa. Cmwlth. 2010); *Brown v. Blaine*, 833 A.2d 1166, 1170-71 (Pa. Cmwlth. 2003).

Regarding the second element of a retaliation claim, an adverse action in the context of a retaliation claim is an action which is "sufficient to deter a person of ordinary firmness from exercising his [constitutional rights]." *Yount*, 966 A.2d at 1121 (quoting *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000)). Appellant alleges that Appellees took adverse action against him for exercising his constitutional rights by issuing him a misconduct report on March 2, 2011, moving him to the Restricted Housing Unit for 30 days and removing him from his job in the culinary department. Such punishment would clearly deter an inmate of ordinary firmness from exercising constitutional rights. Appellant further alleges that he was removed from his job detail cleaning pots, pans and utensils and moved

to a less "prestigious" position on the food service line. Though Appellant did not have a property right to his prison job, *Miles v. Wiser*, 847 A.2d 237, 240-41 (Pa. Cmwlth. 2004), Appellant has plausibly pleaded that moving him from what he alleged was a better job with higher pay to a less desirable job with lower pay would be a sufficient deterrence from exercising his constitutional rights. *See Yount*, 966 A.2d at 1121 ("Where a plaintiff advances a colorable, but not necessarily incontrovertible, argument he was subjected to adverse action, the issue is best resolved by the fact-finder.")

The trial court concluded that Appellant failed to satisfy the third element of a retaliation claim by alleging that his constitutionally protected conduct was a substantial and motivating factor for the adverse action. We agree with the trial court to the extent that it held that the Complaint did not plead that the grievances were a motivating factor in the decision to issue Appellant a misconduct report or to move Appellant from a service line position to a separate position. While Appellant has alleged that his grievances were still pending at the time the misconduct report was issued, (Complaint ¶26), and asserts in a conclusory fashion that the misconduct report was "clear retaliation" for Appellant's grievances, (*id*. ¶15), the Complaint offers no facts other than temporal proximity to explain why his filing of the grievances would have led to the misconduct report. *See Yount*, 966 A.2d at 1122 (holding that temporal proximity by itself does not support an inference of retaliatory intent unless "timing of the alleged retaliatory action [is] unusually suggestive of retaliatory motive") (quoting *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)). The Complaint also does not contain allegations that Appellee Stanitis, who allegedly confronted Appellant about his pants being rolled up, was involved in the earlier

incidents when Appellant asked permission to attend the Eid feast and Jumah services; instead, Appellant alleges that "Sarge," who has not been named in this action, made the determination to not permit Appellant to attend these religious services. (Complaint ¶¶21, 23.) Similarly, Appellant alleged only that the decision to move him to another position in the culinary department immediately followed the issuance of the grievances and Appellant did not allege what reason he was given for the decision, who made the determination or any other factors that would raise a plausible inference that the move was connected to the grievances. (*Id.* ¶25.)

We disagree with the trial court, however, insofar as it concluded that Appellant had not alleged that the March 2, 2011 misconduct report was issued as retaliation for the February 17, 2011 pant-leg incident. Appellant alleges that after Appellee Stanitis confronted him regarding having his pant legs rolled up, Appellant informed her that it was a religious practice and Appellee Stanitis later requested that the service line supervisor order Appellant to leave the job site for the day. (*Id*. ¶¶13, 14, 26.) Appellant further alleges that Appellee Stanitis fabricated the infractions of disobeying an order and using abusive or obscene language towards an employee on the March 2, 2011 misconduct report and intentionally omitted the names of other staff members who were present for the February 17, 2011 incident, which Appellant asserts is the normal operating procedure for misconduct reports. (*Id*. ¶¶27, 28.) Thus, rather than merely alleging that he was charged and found guilty of misconduct, which would be an impermissible appeal of a misconduct finding, as the trial court found, *see Richardson*, 74 A.3d at 357; *Brown*, 833 A.2d at 1171 n.11, Appellant alleges

sufficient facts to raise the inference that Appellee Stanitis fabricated charges as a result of the practice of his religious conduct.

Nevertheless, we agree that Appellant's retaliation claim should be dismissed because Appellant has not alleged that the action by Appellees did not further a legitimate penological interest. As our Supreme Court has explained, the reason for placing the burden of proof on a prisoner-plaintiff to affirmatively disprove a legitimate penological interest stems from the "'potential for abuse' in retaliation claims [and] prison officials' 'legitimate interest in the effective management of a detention facility.'" *Yount*, 966 A.2d at 1120 (quoting *Abdul–Akbar v. Department of Corrections*, 910 F. Supp. 986, 1000-01 (D. Del. 1995)); *see also Richardson*, 74 A.3d at 357. It is well-established that prison officials have legitimate penological interests that would justify the charges asserted in the misconduct report, including promoting institutional order and security and protecting the safety of prisoners and staff. *Turner v. Safley*, 482 U.S. 78, 91-93 (1987); *Overton v. Bazzetta*, 539 U.S. 126, 133-34 (2003); *Bussinger v. Department of Corrections*, 29 A.3d 79, 86 (Pa. Cmwlth. 2011), *affirmed without opinion*, 65 A.3d 289 (Pa. 2013). Though the application of such penological interests to the facts of the case is not an appropriate consideration on preliminary objections, Appellant's failure to even plead the absence of such penological interests renders his retaliation claim deficient.

Free Exercise Clause

Inmates retain their First Amendment rights in an institutional context, including the right to the free exercise of religion. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). However, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,...aris[ing] both

from the fact of incarceration and from valid penological objectives – including deterrence of crime, rehabilitation of prisoners, and institutional security." *Id.* (citation omitted). In order to reconcile institutional interests and the inmate's interest in exercising his constitutional rights, the Supreme Court in *Turner* held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89; *see also O'Lone*, 482 U.S. at 349; *Brittain v. Beard*, 974 A.2d 479, 487-88 (Pa. 2009); *Payne v. Department of Corrections*, 871 A.2d 795, 810 (Pa. 2005).

Here, we conclude that the facts alleged in the Complaint do not set forth a claim of a denial of Appellant's right to the free exercise of his religion under the First Amendment. Appellant alleged that on one occasion while he was working as a food server, he was asked to roll his pant legs down to his boots and after he informed Appellee Stanitis that keeping his pants rolled up was a religious practice, he was returned to his cell from the culinary area of SCI Mahanoy. According to Appellant, the March 2, 2011 misconduct report was issued not for having his pant legs rolled up but instead for disobeying an order and using abusive or obscene language. Appellant did not allege that he was ever disciplined for having his pant legs rolled up, that anyone else besides Appellee Stanitis ordered him to roll down his pant legs or that he ever asked for and was denied an accommodation from the Department's uniform policy. Thus, the most the averments in the Complaint would establish is that on one occasion Appellant was dismissed from the job site for having his pants rolled up. We do not believe that one isolated incident in which Appellant was informed that he needed to roll his pants down and dismissed from work for the day could amount to a violation of Appellant's First Amendment rights, particularly in light of the fact that no

inference can be raised that Appellant requested an accommodation for his religious practice. *Cf. Johnson v. Varano*, (Pa. Cmwlth., No. 714 C.D. 2010, filed March 9, 2011), 2011 WL 10843816, at *6 (holding that a single incident where a Muslim inmate was served pork did not constitute a violation of the inmate's First Amendment rights).[3]

Religious Land Use and Institutionalized Persons Act

RLUIPA was enacted by Congress in 2000 to extend the protections of the federal Religious Freedom Restoration Act to individuals who reside in state and local institutions that receive federal financial assistance.[4] 42 U.S.C. § 2000cc-1(b)(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (holding that RLUIPA allows "prisoners to seek religious accommodations pursuant to the same standard as set forth in [the Religious Freedom Restoration Act]"). In order to assert a claim for a violation of RLUIPA, an inmate must allege that he is (i) engaged in a religious exercise (ii) grounded in a sincerely held religious belief (iii) that is substantially burdened by a prison policy. 42 U.S.C. § 2000cc-1(a); *Holt v. Hobbs*, __ U.S. __, 135 S. Ct. 853, 860 (2015). Once the inmate makes this *prima facie* showing, the burden shifts to the

[3] Appellant also alleged in the Complaint that his requests to attend the Eid feast and Jumah services were denied in November 2010. (Complaint ¶¶21, 23.) However, Appellant does not assert that these were themselves violations of his First Amendment rights, but rather places these allegations in the "Background" portion of his Complaint. A careful reading of the Complaint makes clear that the requests to attend these religious services were relevant only to Appellant's retaliation claim. Moreover, documents attached to Appellant's brief indicate that while Appellant was initially denied permission to attend the services, he was eventually permitted to attend both. (Appellant's Br. Exhibits A1, A2.)

[4] RLUIPA applies by its terms only to state and local government. 42 U.S.C. § 2000cc-5(4)(A); *Mack v. Yost*, 979 F. Supp. 2d 639, 650 (W.D. Pa. 2013). Section 2 of RLUIPA also provides that state and local governments may not impose a substantial burden on religious exercise through the implementation of land-use regulations. 42 U.S.C. § 2000cc.

government to show that its refusal to accommodate the prisoner's request for a religious accommodation is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a); *Holt*, __ U.S. at __, 135 S. Ct. at 860.

In *Holt*, the U.S. Supreme Court held that the Arkansas Department of Corrections' grooming policy that forbid a Muslim inmate from growing a ½ inch beard in accordance with his religion violated RLUIPA. In so holding, the Court made clear that RLUIPA provides "greater protection" for the religious rights of inmates than the First Amendment, __ U.S. at __, 135 S. Ct. at 862 (distinguishing *Turner* and *O'Lone*), including a broad definition of "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and provision that government may be required to "incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C §§ 2000cc-3(c), 2000cc-5(7)(A); *see also Holt*, __ U.S. at __, 135 S. Ct. at 860.

However, despite its expansive protections of religious liberties, RLUIPA is much narrower than a First Amendment claim because it does not provide for damages against state prison officials in either their official or individual capacities. It is a well-established principle of our federal system of dual sovereignty that states and state officials acting in their official capacity are protected from suits for monetary damages except to the extent sovereign immunity has been waived by the state or overridden by Congress. *Alden v. Maine*, 527 U.S. 706, 712-13 (1999). In *Sossamon v. Texas*, __ U.S. __, 131 S. Ct. 1651 (2011), the U.S. Supreme Court considered whether the provision in RLUIPA providing an express private cause of action to "obtain appropriate relief

against a government," 42 U.S.C. § 2000cc-2(a), was sufficient to inform state officials that they were being made subject to money damages. In concluding that Congress had not abrogated the sovereign immunity of the states through RLUIPA, the Court held that Congress must speak unequivocally when it intends to impose money damage remedies on state actors and that the phrase "appropriate relief" did not unambiguously indicate that it intended for money damages to be available under RLUIPA. *Sossamon*, __ U.S. at __, 131 S. Ct. at 1658-60. Though the Court in *Sossamon* did not address suits for monetary damages under RLUIPA against state prison officials acting in their individual capacities, federal courts both before *Sossamon* and after have consistently held that RLUIPA also does not permit actions against state officials in their individual capacities.[5]

Appellant here has only asserted entitlement to the relief of compensatory and punitive damages and he does not seek declaratory or injunctive relief. Because private suits for damages against prison officials are not authorized by RLUIPA and because Pennsylvania has not otherwise consented to monetary damage claims under RLUIPA,[6] Appellant's claim must be dismissed.

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[5] *See Haight v. Thompson*, 763 F.3d 554, 567-70 (6th Cir. 2014); *Wood v. Yordy*, 753 F.3d 899, 903-04 (9th Cir. 2014); *Stewart v. Beach*, 701 F.3d 1322, 1334-35 (10th Cir. 2012); *Sharp v. Johnson*, 669 F.3d 144, 153-55 (3d Cir. 2012); *Nelson v. Miller*, 570 F.3d 868, 885-89 (7th Cir. 2009); *Rendelman v. Rouse*, 569 F.3d 182, 187-89 (4th Cir. 2009); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 326-29 (5th Cir. 2009), *affirmed on other grounds*, __ U.S. __, 131 S. Ct. 1651 (2011); *Smith v. Allen*, 502 F.3d 1255, 1271-75 (11th Cir. 2007), *abrogated on other grounds, Sossamon v. Texas*, __ U.S. __, 131 S. Ct. 1651 (2011).

[6] Pennsylvania's Religious Freedom Protection Act (RFPA), Act of Dec. 9, 2002, P.L. 1701, 71 P.S. §§ 2401–2407, which applies in the prison context in Pennsylvania, expressly provides that monetary damages are not available. *See* Section 5(f) of RFPA, 71 P.S. § 2405(f) ("No court shall award monetary damages for a violation of this act.").

Equal Protection

The Equal Protection clause of the Fourteenth Amendment requires that state officials treat all similarly situated individuals alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Curtis v. Kline*, 666 A.2d 265, 267 (Pa. 1995). The right to equal protection, however, "does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment and does not require equal treatment of people having different needs." *Curtis*, 666 A.2d at 267 (citation omitted); *Meggett v. Department of Corrections*, 892 A.2d 872, 885 (Pa. Cmwlth. 2006). To determine whether a classification is justified, we must first determine the appropriate standard of review; "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 440. However, where the classification implicates a suspect class or a fundamental right, the provision must be strictly construed to serve a compelling government interest. *Id*.; *Curtis*, 666 A.2d at 268. An intermediate level of scrutiny lies between the strict scrutiny and rational basis tests and is applied in cases that implicate important but not fundamental rights and requires that the provision at issue is substantially related to an important government interest. *City of Cleburne*, 473 U.S. at 440-41; *Curtis*, 666 A.2d at 268.

Here, though he has asserted a violation of his rights to equal protection under the law, Appellant has failed to identify in the Complaint any statute, regulation or policy which he is challenging and fails to identify a class of persons of which he is a member that is treated differently under the challenged provision. To the extent Appellant appears to challenge the Department's policy

regarding state-issued items in place at the time of the events complained of in this suit,[7] there is no indication that this policy treats any class of prisoners differently with respect to the way it wears its uniform. Thus, because Appellant has failed to identify a class of individuals who were discriminated against, Appellant's equal protection claim must be dismissed.[8]

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[7] *See* DC-ADM 815. As the parties note in their briefs, on January 24, 2013 the Department issued DC-ADM 819 pertaining to religious activities, which provides that:

> At no time will an inmate uniform be modified in any way (e.g., hemming pants legs, etc.) for any religious purpose. An inmate whose faith tradition mandates that his/her pants be worn above the ankles may be permitted to temporarily adjust his/her garments during an approved communal religious service only. At the conclusion of the service, the inmate must return his/her uniform to the way it was issued or face disciplinary action.

Id. § 3(A)(1)(t)(2), available at http://www.cor.pa.gov/Administration/General%20Information/Pages/DOC-Policies.aspx#.VR7plP50xOX (last visited April 2, 2015). However, because this policy was not in effect during the time of the events at issue in this suit and because Appellant's suit only seeks monetary damages for past events, DC-ADM 819 is irrelevant for our consideration in this appeal.

[8] Appellant also asserted in the Complaint that Appellees' conduct violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, and Department regulations. The trial court did not address these claims in its decision on the preliminary objections and Appellant does not challenge this as error on appeal. Nevertheless, such claims are clearly without merit as Title VII addresses workplace discrimination and no employment relationship exists between an inmate and his place of incarceration. *See, e.g., Iheme v. Smith*, 529 Fed. Appx. 808, 809 (8th Cir. 2013); *Wilkerson v. Samuels*, 524 Fed. Appx. 776, 779 (3d Cir. 2013); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). Appellant also failed to state a claim for violation of Department regulation as he did not identify any specific regulation in the Complaint which Appellees allegedly violated. In his appellate brief, Appellant additionally asserts that Appellees violated his First Amendment free speech rights; however, Appellant did not raise this in his Complaint or before the trial court. *See Pennsylvania Bankers Association v. Pennsylvania Department of Banking*, 962 A.2d 609, 621 (Pa. 2008).

IV.

For the reasons stated above, we conclude that the trial court properly sustained Appellees' preliminary objections in the nature of a demurrer and dismissed the Complaint. Accordingly, the order of the trial court is affirmed.

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JAMES GARDNER COLINS, Senior Judge

Judge McCullough concurs in the result only.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barry Mallory,	:	
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Appellant	:	
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v.	:	No. 365 C.D. 2014
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C. Stanitis, Culinary Manager 1,	:	
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Tritt, Deputy Superintendent, John E.	:	
Wetzel, Secretary of Correction	:	

O R D E R

AND NOW, this 5th day of May, 2015, the order of the Court of Common Pleas of Schuylkill County in the above-captioned matter is hereby AFFIRMED.

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JAMES GARDNER COLINS, Senior Judge