COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY

FAR. NO. SJC. 27828

APPEALS COURT

NO. 2019-P-0824

G.SAIF SABREE, ET AL., PRO SE,
PLAINTIFFS/APPELLANTS,

VS.

DANIEL BENNETT, SECRETARY
EXECUTIVE OFFICE OF PUBLIC
SAFETY AND SECURITY, ET AL.,
DEFENDANTS/APPELLEES.

PLAINTIFFS/APPELLANTS APPLICATION REQUESTING FURTHER APPELLATE REVIEW

G.SAIF SABRE, ET AL.
W34619
Mass. Treatment Center
30 Administration Rd.
Bridgewater, Mass. 02324

I. INTRODUCTION.

Inappropriately, the Appeals Court designated the plaintiffs, a class of black prisoners, federal and state law claims raised within their civil rights complaint and appellate brief worthy of only a Rule 1:28 decision primarily applicable to the parties that denied a second the plaintiffs action seeking declaratory judgment, injunctive relief and damages and class certification, without allowing the plaintiffs Rules 27, 33 & 34 discovery, affirming the lower courts dismissal of the complaint claiming racial and gender discrimination with animus-attached as nothing more than a frivolous matter, as well as, denial of prisoners, regardles of status, the substantive due process and equal protection under law, relative to lesser classifications to lower security facilities that enhance parole suitability upon parole eligibility dates.

II. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW.

The plaintiffs/appellants, pursuant to Rule 27.1 of the Mass.R.App.P, and G.L.c. 211A, § 1 (Appeals Court), hereby request leave to obtain further appellate review of the decision of the Appeals Court, issued July 20, 2020 (a copy of the Rule 1:28 decision is hereto-attached) affirming the trial court's denial of the civil rights complaint with jury demand (a copy of the trial couet's denial is hereto-attached).

The plaintiffs case and appeal to the Supreme Judicial Court (SJC) raises substantial and important federal and state constitutional law claims affecting the public interest and in the interest of justice, and the issues raised by the request are

ripe for examination and determination by the full court relative to its precedent and the precedent of the Appeals Court regarding substantive law claims relative to race and gender discrimination and class certification brought by black prisoners dismissed by both lower courts as frivolous and precluding any discovery of facts alleged against state actors and those acting on the behest of the state.

III. STATEMENT OF PRIOR PROCEEDINGS.

The plaintiff, G.Saif Sabree, acting pro se, on behalf of himself and all other similarly situated black prisoners at the Massachusetts Treatment Center (MTC), in Decmber 2016 intiated in the Suffolk Superior Court a civil rights complaint with jury demand seeking declaratory judgment, injunctive relief and damages, alleging, inter alia, race and gender based discrimination with animus attached, against the defendants former Daniel Bennett, former Secreatary Office of Public Safety and Security; Thomas Turco III, former Commissioner Mass. Dep't. of Corr.; Steven O'Brien, former/retired Superintendent Mass. Treatment Center; Steven Wheeler, President/Chief Executive Officer MHM Correctional Services (MHMCS), Inc.; George John Regional Directors MHMCS, and Kimberly Lyman-Julius Program Director MHMCS.

In May 2018 the appellant served upon the defendants Rule 34 request for production of documents, and in May 2018 defendants Wheeler, Johns and Lyman-Julius filed motion to stay discovery, and in June 2018 defendants Bennett, Turco III and O'Brien filed motion to stay discovery and in June 2018 the trial court allowed

both defendants motions to stay discovery. Ames, J. Thereafter, plaintiff filed motion to submit additional exhibits with attached exhibits in support of the complaint without opposition allowed by the court detailing further incidents of racial discriminatory acts by defendants staff.

On November 27, 2018, Heidi Brieger, J., held hearing on defendants motion to dismiss filed July 31, 2018 and August 24, 2018, respectively. On April 8, 2019, Brieger, J., allowed defendants' motion to dismiss and on April 16, 2019 notice of appeal from udgment was filed and on September 12, 2019 plaintiff filed appellate brief in the appeals court and on July 20, 2020 the trial court dismissal was affirmed with rescript issued August 18, 2020.

IV. STATEMENT OF THE FACTS.

In November 2014 the plaintiff was transfered to the Mass. Treatment Center (MTC) as a state prisoner to attend and participate in the sex offender treatment program (SOTP) as stipulated by the Mass. Parole Board, relative to his 1974 conviction on charges of armed assault in a dwelling house w/ intent to commit a felony, armed robbery, rape etc, and plaintiff was paroled on two prior occasions, December 1988 and July 2003, respectively without SOTP completion stipulation.

Plaintiff, pursuant to G.L.c. 123A, § 6 (1958) was lawfully adjudicated a nonsexually dangerous person (non-SDP) by the Mass. Treatment Center (Saltzman, MD. 1974), which under law and regulation in effect at that time permitted the plaintiff lesser seurity minimum security reclassifications and work

release programs within various Massachusetts community and unsupervised furloughs for home and community visits and the grant of the first December 1988 parole. The plaintiff during almost 47 years of imprisonment has been confined within every adult correctional facilitiy in the Commonwealth, i.e., maximum, medium and minimums, as well.

The plaintiff, was born in the southeastern United States and came to Boston in the Mid-1960s, and the plaintiff administratively avers, that throughout his imprisonement he has never been confined to a correctional facility overtly racial and gender discriminatory and psychologically hostile to black prisoners and their aspirational interest in SOTP competions rendering thoughts of disenfranchisement, marginalized, humiliated and feeling less than, and sometime felling mentally emasculated.

The MTC state prison population consist of approximately 63% white males, 25% hispanic and other nonblack males and 12% black prisoners. The SOTP staff is approximately 98% white and female that may posses stereotypical racial perceiptions and attitudes of black male risoners as too aggressive and physically threatening to white and nonwhite prisoners and staff. In May 2019, the plaintiff resulting from continued therapeutic staff discriminatory custom and practices regarding regarding racial disparity in SOTP completion rates between black and white prisoners submitted an official complaint with staff detailing personal observations and knowledge concerning issues of racial disparities in SOTP completions. By return correspondence, dated May 7, 2019, wihtout offering more than

an unsupport statement of denial of discriminatory treatment, stated that statistically there is no difference between the races relative to SOTP completions. In August 2018, the plaintiff submitted to the trial court with service upon the defendants, as exhibits the formal complaint and defendants answer without opposition, allowed by the court.

Thereafter, resulting from plaintiff's SOTP primary group therapist telling him that he needs to stop speaking about the discrimination with SOTP, the plaintiff as a follow up to the submitted additional exhibits to the court, Brieger, J., asking that the court take judicial notice of continued staff discriminatory conduct and treatment and plaintiff's concerns of retaliatory and punitive treatment of him and other black prisoners who spoke to the racial disparities in SOTP completions and other treatment issues for possible parole considertations. The court, Brieger, J., dated January 17, 2019, served on plaintiff and defendants notice of its taking judicial notice of plaintiff January 3, 2019, correspondence stating "so noted."

In July 2018, A new company acquired the DOC MTC SOTP contract retaining much of the same staff and from August 2018 thru April 2019 SOTP completions were grant to white, hispanics and other nonblack prisoners and it was not until the last week of April 2019 did a black prisoner complete the SOTP and it was because of his July 2019 discharge/wrap-up date from imprisonment. Which again, left black prisoner with thoughts and feelings of disenfranchisement, marginalized etc.

Moreover, within MTC there are four major areas of prison

inmate work employment that provide good to above average pay that to date remain predominately with a 90% to 100% white work force, however, there remain ample menial labour intensive job assigments for black prisoners, i.e., the maintenance department don't allow black prisoners.

Moreover, the DOC, together with its private SOTP providers, by custom and practice, have enacted an unlawful policy practice, in violation of substantive law under G.L.c. 127, § 49(Programs Outside a Correctiona Facilities), which discriminates against a majority male, current and past convicted sex offender depriving them of lawful privilege of lesser reclassiications to lesser security nonwalled correctional facility transfers which enhance parole suitablility upon their parole eligibility dates relative to rehabilitative DOC program treatment, under c. 127, § 49 resulting from SOTP completions.

Additionally, the DOC has implemented in violation of c. 127, § 49, supra and 103 DOC 446.00(Sex Offenders Management), a COde C Report/Objective Classification - Male Reclassification Form which is used to override and supercede a lawful inmate lesser security privilege, which reads in pertinent parts:

> "Code C: Sex Offenders Status-- Inmates who are subject to civil commitment post release are not to be considered for minimum security or below." emphasis added

a DOC policy that maintain a discriminatory impact and deprive all other similarliy situated male prisoners with current or past sex offense convictions from lawful access to rehabilitative positive programming privileges.

Furthermore, this court should take judicial notice of c.

127, § 49 built in contradictory and conflicting language, which reads in relavant parts lines 17 thru 22:

> No sex offender in the custody of the department of correction shall be eligible to participate in any program outside a correctional facility established under section fourty-eight "unless he has completed the department's voluntary sex offender treatment program." id. at l. 17-22 emphasis added

as opposed to the language in l. 22 thru 22 of § 49 that is contradictory and conflicts with l. 17 thru 22 of § 49, which reads in relevant parts:

> No sex offender, or sexually dangerous person as defined in section one of chapter 123A, or any person who commits a sexual offense as defined in 24B of chapter 265 "shall be eligible for any program outside a correctional facility authorized by law." id. at l.22 thru 26 emphasis added

The legislature has deliberately created and enacted an ambiguous and contradictory law, c. 127, § 49, that has lead for state prisoners, to an unreasonable and absurd outcome with illogical results which has allowed the DOC to enact a created internal policy, Code C override, that deprive a prisoner with a current or past sex offense conviction from a lesser security nonwalled minimum facility and rehabilitative program privilege. supra.

ARGUMENTS.

I. IT WAS ERROR AS A MATTER OF LAW AND ABUSE OF DISCRETION FOR THE APPEALS COURT TO AFFIRM THE TRIAL COURT'S DENIAL OF THE COMPLAINT AS FRIVOLOUS RELATIVE TO PLAINTIFF'S CLAIMS SEEKING CLASS ACTION CERTIFICATION RELATIVE TO RACE AND GENDER BASED DISCRIMINATION WITH ANIMUS ATTACHED AND DEPARTMENTAL DENIAL OF LAWFUL RIGHTS TO PRISON REHABILITATIVE PROGRAM PRIVILEGES UNDER G.L.C. 127, §49 PURSUANT TO STANDARDS OF REVIEW UNDER RULE 12(b)(6) OF THE MASS.R.CIV.P.

The Supreme Judicial Court in L.L. v. Commonwealth, 470 Mass.

169, 20 N.E.3d 930 (2914), announced a new standard of review for judicial abuse of discretion stating:

> An appellate court's review of a trial judge's discretion must give great difference to the judge's exercise of discretion, it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result but the "no conscientious judge" standard is so deferential that, if actually applied, abuse of discretion would be as rare as flying pigs. WHen an appellate court concludes that a judge abused his or her discretion, the court is not, in fact, finding that the juge was not conscientious or, for that matter, not intelligent of honest barrowing from other courts, we think it more accurate to say that a judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made "a clear error of judgment in weighing" the factors relevant to the decision , such that the decision falls outside the range of reassonable alternatives. L.L. v. Commonwealth, 470 Mass. 169, 20 N.E.3d 930 (citation omitted). emphasis original

Groff v. da Silva, 2015 Mass. App. DIv. 150. Killoran v. Boyles, 2012 Mass. App. Div. 86. Mass.R.Civ.P. 12(b)(6) permits the court upon the motion of a party, to dismiss a complaint for failure to state a claim upon which relief can be granted. Maas. R.CIv.P. 12(b)(6). Motions under Rule 129b)(6) calls upon the court to teat the legal sufficiency of the complaint. The purpose of Mass.R.CIv.P. 12(b)(6) is to permit the prompt resolution of a case where the al;legations of the complaint clearly demonstrate that the plaintiff's claim is legally insufficient. Harvard Crimson, Inc. v. President and Fellows of Harvard College, 445 Mass. 475, 478-479 (2006). Fabrizio v. Quincy, 9 Mass. App. Ct. 733, 734 (1980). In evaluation the allowance of a motion to dismiss, we are guided by the familiar principle that a complaint is sufficient "unless it appears beyond doubt that the plaintiff can prove no set of facts in support [its] claims which would entitled [it] to

relief." Nader v. Citron, 372 Mass. 96, 98 (1977), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The allegations of set forth in the complaint, as well as such reasonable inferences as may be drawn therefrom in the plaintiff's favor, are to be taken as true. See Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 429 (1991). Harvard Crimson, Inc., 445 Mass. at 748-749. id.

The trial court and appeals court committed error as a matter of law and abuse of discretion allowing the defendants motions to dismiss the plaintiff's complaint without allowing any discovery to occur in effect protecting the state actors from provable allegations of racial and gender discrimination and departmental reclassification deprivations of lawful lesser nonwalled minimum security treatment which would enhance parole suitability upon parole eligibility dates, against a class of convicted sex offender, current or past. The trial court's reasons for granting the motion to dismiss is as follows:

> Endorsement on Motion to Dismiss (#28.0): Allowed
> After a hearing and careful consideration of the parties' written submissions, this motion is ALLOWED insofar as plaintiff's complaint contains no allegations of discrimation directed at plaintiff, nor does the complaint allege any factual damages suffered by plaintiff. This complaint makes unsupported abd conclusionary allegations, and fails to amke any allegations against a number of defendants aside from identifyinh them as parties. Finally, the court finds, for all the reasons stated on Paper #32, that plaintiff raises a serious issue concerning an abuse of the justice system through repeated filing of frivolous pleadings, continuing to do so may cause the court to impose sanctions. (dated 3/27/19)(Brieger, J.)

The appeals court affirming of the trial court's allowance of defendnats' motion to dismiss under Rule 12(b)(6) prior to any meaningful Rule 34 discovery could be had in the tiral court was further error as a matter of law and an abuse of discretion, ham stringing the plaintiffs' ability to submit sufficient

factual evidence in support of the complaint, as well as a courts' demonstration of prejudice against plaintiffs class as convicted, current or past, sex offenders based on nothing-less than the nature their offenses. When discovery would have shown that black prisoners at MTC were less likely to timely complete the SOTP and had less completion rates that their white counterparts, prior to and after the DOC changed their SOTP providers, supported by the plaintiff by the court's allowance of motion to submit additional exhibits in support of the complaint without defendants' opposition detaing further discriminatory and retaliatory treatment of plaintiff and other black prisoner who spoke to their MTC SOTP treatment, and plaintiff's written request for the court to take "judicial notice oc continuing racial discriminatory conduct and treatment by SOTP staff, allowed by the court January 17, 2019, Brieger, J., who failed to address her allowance of the motion when granting defendants' motion to dismiss.

The plaintiff submitted specific facts tot he trial court and appeals court within the complaint and appellate brief supported by affidavit relative to claims of racial and gender discrimination not refuted by affidavits of any defendants or subordinate support staff/employees.

II. THE APPEALS COURT COMMITTED ERROR AS A MATTER OF LAW DENYING PLAINTIFFS' MOTION SEEKING CLASS CERTIFICATION PURSUANT TO RULE 12(b)(6) OF THE MASS.R.CIV.P.

The plaintiffs' moved in the trial court for class action certification relative to the complaint, individually and collectively, against the defendants, pursuant to Rule 23 of the

Mass.R.Civ.P. alleging, inter alia, racial and gender discrimination relative to SOTP completion rates between black and white prisoners, job and housing assignments, and as a group of convicted sex offenders which includes nonblack prisoners deliberately denied by defendants, collectively and individually, the benefits of lawful departmental reclassifications and transfers to lesser nonwalled minimum security facilities, under G.L.c. 127, § 49(Programs outside Correctional Facilties) and 103 DOC 446.00(Sex Offender Management) and 103 CMR 420.00 (Classification/Reclassification), which established the prerequisites that plaintiffs as a class must meet satisfy in order for the court to certify as a class.

The appeals court in Johnson v. Ryan, 89 Mass. App. Ct. 1121 (May 5. 2016)(Rule 1:28 unpubl. decision), held, it was premature for the judge to dismiss the complaint... before ruling on the plaintiffs' motion for class certification. Per the appeals court's holding in Johnson, supra, it was an error as a matter of law and abuse of discretion for the appeals court to affirm the trial court's dismissal of the complaint before ruling on the instant plaintiffs' Rule 23 motion seeking class action certification, based on the court's holding in Johnson, supra. To support class certification, the plaintiff must satisy the four prerequisites of the Mass.R.Civ.P. Rule 23 (a) and the two additional requisites of Rule 23(b). Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 51-52(2014). Specifically, the plaintiff must show that "(1) the class is so numerous that joinder of all members is impractible, (2) there are questions of law or fact common to the class, (3) the claims

or defenses of the representative parties are typical of the claims or-defenses of the class, and (4) the representative parties will fairly and adequately protected the interest of the class," and that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the contraversy," Mass.R.CIv.P. 23 (b). Norrell v. Spring Valley Country Club, Inc., 33 Mass. L. Rep. 299 (2016). See Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. at 52. The plaintiff satisfies this showing by providing "information sufficient to enable the motion judge to form a reasonable judgment" that the class meets all the requisites of Rule 23. An abuse of discretion occurs when a decision is arbitrary, unreasonable, or capricious, Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986), such as when a judge grants class status on the basis of speculation or generalization regarding satisfaction of the requirements of rule 23, or denies class status by imposing, at the certification stage, the burden of proof that will be required of the plaintiff at trial. See Blackie v. Barrak, 524 F.2d 891, 901 n.17 (9th.Cir.1975), cert. denied, 429 U.S. 816, 50 L.ED.2d 75, 97 S.Ct. 75 (1976)("Neither the possibility that ... plaintiff will be unable tp prove his allegations, nor the possibility that the later course of the suit might unforeseeable prove prove the original decision to certify a class wrong, is a basis for declining to certify a class which

apparently satisfies the rule"). id.

Based on the aforemention reasons and authorites cited in support, the trial court should should have issued a ruling on the plaintiffs request seeking class certification and the appeals court should have also issued a ruling on whether or not it was an abuse of the trial court discretion to deny class certification, relative to plaintiffs claims that black prisoners as SOTP participants were being deliberately denied equal treatment under substantive law regarding SOTP program completion rates, prison job and housing assignments etc, based on race and gender discrimination, as compared to the treatment and SOTP completion rates of white prisoners at MTC, as well as lawful reclassifications and transfers to lesser nonwalled minimum security facilies whichenhance parole suitability upon parole eligibility dates.

III. STANDARD OF REVIEW RELATIVE TO SUBSTANTIVE PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF LAW REAGARDING RACIAL DISCRIMINATION UNDER **(A)** THE FOURTEENTH AMENDMENT AND 42 U.S.C. §§ 1983 AND 2000d AND UNDER **(B)** ARTICLE TWELVE OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

42 U.S.C. § 1983 provides a cause of action based on the deprivation of constitutional rights "under the color of any statute, ordinance, regulation, custom, or usuage, of any state." 42 U.S.C. § 2000d. Prohibition is against the exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, or natural origins... No person in the United States shall, on the of race, color, or natural origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving federal assistance.

Watson v. Forth Worth Bank & Trust, 487 U.S. 977, 994, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). A plaintiff must show that the identified practices "caused a disparate impact on the basis of race." 42 U.S.C. 2000e-2(k)(1)(A)(1). The Supreme Court has most recently described a prima facie showing of disparate impact as "essentially a threshold showing of significant statistical disparaty ... and nothing more." Ricci v. DeStefano, 557 U.S. 557, 587, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009). See Fudge v. City of Providence Fire Dep't., 766 F.2d 650, 658 n.8 (1st.Cir.1985)(holdong that a prima facie case of disparate impact can be established where "statistical test sufficiently diminish chance as likely explanation."). Jones v. City of Boston, 752 38, 46-49 (1st.Cir.2014). See, e.g., Latinos Undos De Chelsea v. Secretary hous. & Urban Dev. 799 F.2d 774, 785 (1st.Cir.1985)("Under the statue itself, plaintiff must make a showing of discriminatory intent; under the regulations, plaintiff simply must show a discriminatory impact.")(citation omitted). The U.S Supreme Court has also held that standard of equal protection principles and prisoners equalprotection claims are generally governed by the "reasonable relationship test of Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254 (1987), or have treated the rational basis standard as equivalent to the Turner standard in prison cases. Johnson v. California, 543 U.S. 499, 506-07, 125 S.Ct. 1141 (2005)(The Supreme Court ... said that principles of difference to prison officials' judgment does not apply to cases involving racial discrimination). id. Johnson, 543 U.S. at 509-14.

The plaintiffs submitted sufficient factual evidence in the trial court and within his appellate brief support by his affidavit that was not refuted by defendants subordinate employees filing any affidavits, regarding the plaintiffs claims of discriminatory intent and disparate impact of SOTP completion rates between white and black prisoners, as well as in housing and job assignments. And as a direct result of the trial court's prejudice, the plaintiff was prevented from conducting meaningful discovery that would have allowed him to produce substantial documentory evidence of discriminatory intent, statistically and otherwise, and also, of the defendants subordinate staff/employees retaliatory and punitive treatment of plaintiff and other black prisoners who complained of discriminatory acts and were told on more than one occasion they should stop talking about the discrimination in SOTP completion rates, while the defendants continued to complete white SOTP participants. Black prisoners who were made to be silent and made to do twice as much as their white counterparts only to receive half of what their white counterparts received from SOTP. If statistics are to be considered as the sole basis for inferrinf discriminatory motive, the disparaty between the compared groups must be so large and signficant that such disparaty could not be caused by chance. McClesky, 481 U.S. at 293-294; Castaneda by Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th.Cir.1986).

IV. THE TRIAL COURT WAS OBLIGATED TO ISSUE FINDINGS OF FACT AND CONCLUSION IN LAW UNDE **(A)** DECLARATORY JUDGMENT STANDARDS PER G.L.C. 231A, § 1 ET SEQ, RELATIVE TO **(B)** G.L.C. 127, § 49(PROGRAMS OUTSIDE

CORRECTIONAL FACILITIES) AND (C) G.L.C. 127, § 32 (TREATMENT OF PRISOENRS) RELATIVE TO PLAINTIFFS ALLEGATIONS OF DEFENDANTS DEPRIVATIONS OF STATE STATUTORY LAW RIGHTS

The trial court failed as a matter of law to issue findings of fact and conclusions of law relative to plaintiffs allegations that the defendants, individually and collectively, deliberately deprived them of statutory law rights entitling state prisoners with currentl or past sex offense convictions from as SOTP completer from receiving departmentel reclassifications and transfers to lesser nonwalled minimum security facilities that would enhance parole suitability upo parole eligibility datss and plaintiffs claims of housing and job assignments discrimination, not just directed at black prisones but toward sex offenders in general. G.L.c. 231A, § 1 et seq, An "actual controversy," as those words are employed in this section, is not limited to instances where rights of one party have been impared or damaged by the acts of another. School Committee of Cambridge v. Superintendent of Schools, 320 Mass. 516, 518 (1946). One of the benefits of declaratory procedures is that it does not require one to incur the risk of violating some term of a contract or of invading some right of the other, even in good faith, before he may have relief. Indeed, our act provides that one may seek declaratory judgment or decree "either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen." G.L.c. (Ter. Ed) c. 231A, § 1. We think a pleading is sufficient if it sets forth a real dispute caused by the assertion by another party also having a definite interest in the subject matter, where the circumstances attenting the dispute plainly

indicates unless the matter is adjusted such antagonistic claims will almost immediately lead to litigation. United Galvaninzing & Plating Equipment Corp. v. Hanson-Van Winkle-Mining Co., 104 Fed. 2(d) 856. School Committee of Cambridge, 320 Mass. at 518. id.

The DOC beginning in 1995 to date, have enacted an administrative policy designed to supercede and deprive without any procedural due process of law, lawful entilement, under G.L. c. 127, § 49(Programs outside correctional facilities), as current or past convicted sex offenders reclassifications and transfers to nonwalled lesser minimum security facilities that would enhance their parole suitability upon their parole eligibility dates. C. 127, § 49(l.17-22). Defendants actions that have created an actual controversey in law which the plaintiffs complaint supported by affidavit clearly and sufficiently establish a real and actual controversy between the parties to legal rehabilitative status and rights under substantive law.

The DOC policy reads; "Code C: Sex offender Status - Inmates who are subject to civil commitment post release are not to be considered for minimum security or below." Emphasis added. The departmental Code C override creates an unlawful discriminatory impact which deprives all male convicted sex offenders from the desired reclassifications and transfers to lesser nonwalled minimum security facilities, in violation of c. 127, § 49, supra, relative to the substantive due process and equal protection under law. Lyman v. Commissioner of COrrection, 46 Mass. App. Ct. 202, 206-207 (1998)(The sex offender

treatment policy at issue in this case has been determined by the United States Court of Appeals for the First Circut, which we agree, to be essentially remedial and not punitive in nature "unless and until [a sex offender] successfully completes the prescribed treatment program and admits to a crime he has continually denied, he must remain confined at no less than a medium security facilitiy and remain ineligible for privileges associated with lower security imprisonment." emphasis orig. Moody v. Sex Offenders Registry Board, 2006 Mass. Super. LEXUS 128 (Within the state correctional system there are statutory and policy based restrictions on the classification of sex offenders. A sex offender is precluded from participating in any program outside of the correctional facility. Chapter 127, Section 49. The Department of Corrections (DOC) Sex Offender Management Policy 103 DOC 446 (September 2003) which is a voluntary paricipation program that no inmate who is identified as a sex offender shall be classified lower than level 4 without having successfully completed all the programs described in the regulation. The regulation provides that the primary goal of DOC's classification process is to provide a systematic means by whihc the security requirements and programmatic need of inmates are assessed in relations to the department rules and regulations, statutory requirements and available resources.). id. The enactment of DOC internal classification of Code C policy overirde to supercede state law to preclude any current or past convicted sex offender from benefitting from a lawful rehablilitative program is an abuse of discretion and authority is a deliberate violation of state law, under G.L.c. 124, § 1

(a-f & q)(Duties of Commissioner of Correction), and G.L.c. 127, § 32 (Treatmentof Prisoners),which obligates the DOC to "treat the prisoner with the kindness which their obediance, industry, and good conduct nerits." The purpose of this law is to assure "equal treatment, as afar as reasonably be, for prisoners who are not being disciplined." Blaney v. Commissioner of Correction, 374 Mass. 337, 341 (1978). Mass. Gen. Laws, ch. 127, § 32 is a legislative mandate. id.

V. THE PLAINTIFF AND OTHER SIMILARLY SITUATE BLACK PRISONERS WERE SUBJECTING TO RETALIATION FOR PLAINTIFF ORIGINAL INTIATING OF CIVIL RIGHTS SUIT AGAINST DEFENDANTS AND CONTINUED COMPLAINTS REGARDING RACIAL DISCRIMINATION RELATIVE TO THE DISPARATE SOTP COMPLETION RATES ETC BETWEEN BLACK AND WHITE STATE PRISONERS

Faust v. Cabral, 2013 U.S. DIst. LEXIS 106373, Prisoners "have a First Amendment right to petition the prison for the redress of grievances and prison officials may not retaliate against prisoners for exercising that rights." Schofield v. Clarke, 769 F.Supp.2d. 42, 46 (D.Mass.2011). To state a First Amendment retaliation claim against prison officials, a prisoner must allege that: (1) he engaged in constitutionally protected conduct, (2) the prison official took an adverse action against him, and (3) there was a causal connection between the protected conduct and the adverse action. Hannon v. Heard,645 F.3d 45, 48 (1st.Cir.2011). Star v. Moore, 2010 U.S. 2010 U.S. LEXIS 85426, "[G]overnment actions, which standing alone do not violate constitution, may nonetheless be constitutional tort if motivated in substantial part by a desire to punish an individual for exercise of a constitutional right."

Mitchell v. Horn, 318 F.3d 523, 530 (3rd.CIr.2003): See Oropallo v. Parrish, No. 93-1953, 1994 U.S. App. LEXIS 9748 WL 168519, at *3 (D.N.H. May 5, 1994), aff'd, 23 F.3d 394 (1st.Cir.1994) (Citing Ferranti v. Moran, 618 F.2d 888, 892 n.4 (1st.Cir.1980) ("[A]ctions otherwise supportable lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms.)(citation omitted).Ayotte v. Barnhart, 973 F.Supp.2d 70, 90-93 (1st.Cir.2013), The First Circut has additionally held that to succeed on a claim of retaliation, the prisoner "must establish, among other things, 'a retaliatory adverse act' that is more than de minimus." Pope v.Beard, 2011 U.S. App. LEXIS 2764, at *4, 2011 WL 478055, at 82 (1st.Cir.2011)(quoting MOrris v. Powell, 449 F.3d at 685-686 (quotation marks and citation omitted)).

The plaintiff submitted to the trial court within the complaint supported by affidavit and to the appellate court that the MTC SOTP staff had acted to their detriment for his intiating the civil complaint with additional evidence filed witht the trial court on January 18, 2018 and August 15, 2018 of not just retaliatory acts through black prisoners being held back from SOTP completions who had done the program work, such as the plaintiff, that we should stop talking about the racial discrimination in SOTP completions "because it doesn't look good for them," as was told to the instant plaintiff by his primary group therapist on more than one occasion and the instant plaintiff after completing his program work and awaiting the program completion application for the board, the SOTP on July 1, 2018 contracted to a different provider setting the

setting the plaintiff back, programmatically speaking, to a phase beneath completion eligible, as opposed to the treatment repeat white sex offenders and the problematic behaviors of other white prisoners who were completed before the new SOTP prider's July 2018 due date, which prevented any adverse civil commitment proceedings. Discriminatory and retaliatory actions which Substantial discovery would have brought to light.

VI. CONCLUSION.

WHEREFORE, the plaintiff/appellant prays this Honorable Court allow his application requesting further appellate review, for the reasons and authorities set out within this REQUEST.

Respectfully submitted by

G.Saif Sabree

Dated: 10/23/20

G.Saif Sabree
W34619
Mass. Treatment Ctr.
30 Administration Rd.
Bridgewater, Mass. 02324

CERTIFICATE OF SERVICE

I, hereby certify that I have caused a true and accurate copy of the hereto-attached Request for Further Appealte Review to be served upon the defendants/appellees:

Brian P. Mansfield, Esq
Dept. of Corr.
Mass. Treatment Ctr.
30 Administration Rd.
Bridgewater, Mass. 02324
(by intrainstitutional mail)

Gorge J. Puddister, Esq
Koufman & Frederick, LLP
Attorneys at Law
145 Tremont Street, 4th Fl
Boston, Mass. 02111
(by 1st class U.S. mail)

at their normal places of business on this date.

Dated: 10/23/20

/s/ G.Saif Sabree

45

JUDGMENT AFTER RESCRIPT	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1784CV00314	Michael Joseph Donovan, Clerk of Court
CASE NAME Sabree, G Saif vs. Bennett, Daniel et al	COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

This action was appealed to the SJC or Appeals Court for the Commonwealth, the issues having been duly heard and the SJC or Appeals Court having duly issued a rescript,

It is **ORDERED and ADJUDGED**:

JUDGMENT/ORDER after Rescript: The original judgment (#40.0) is Affirmed. After hearing and careful consideration of the parties' written submissions, the Defendants' Motion to Dismiss is ALLOWED. Entered on docket pursuant to Mass R Civ P 58(b) and notice sent to parties pursuant to Mass R Civ P 77(d).

JUDGMENT ENTERED ON DOCKET 8/18/2020
PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO
OF MASS.R.CIV.P. 77(d) AS FOLLOWS:

notice sent
8/18/20 (CD)
MPM
BPM
GJD
GSS

DATE JUDGMENT ENTERED	~~CLERK OF COURTS~~/ ASST. CLERK
08/18/2020	X First

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
Boston, Massachusetts 02108-1705
(617) 725-8106; mass.gov/courts/appealscourt

Dated: July 20, 2020

G. Saif Sabree, Pro Se
30 Administration Road, W34619
Bridgewater, MA 02324

RE: No. 2019-P-0824
Lower Court No: 1784CV00314

G. SAIF SABREE vs. DANIEL BENNETT & others

NOTICE OF DECISION

Please take note that on July 20, 2020, the Appeals Court issued the following decision in the above-referenced case. In light of public health concerns arising from the COVID-19 (coronavirus) pandemic and the State of Emergency declared by the Governor, the requirement that the Clerk provide notice and a copy of the decision and rescript is temporarily suspended. See Mass. R. A. P. 2 & 31(c). All persons receiving notice of the decision are directed to receive it via the Reporters Office at https://www.mass.gov/service-details/new-opinions. Only self-represented litigants in an institution or parties for whom the Appeals Court does not have an e-mail address on file will receive a paper copy of the decision.

Decision: Rule 23.0 Judgment affirmed. (Vuono, Milkey, Desmond, JJ.). *Notice.

Any further filings in this appeal by attorneys must be filed by using the electronic filing system. For access go to http://www.efilema.com/.

Very truly yours,
Joseph Stanton, Clerk

To: G. Saif Sabree, Mary P. Murray, Esquire, Brian P. Mansfield, Esquire, George J. Puddister, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-824

G. SAIF SABREE

vs.

DANIEL BENNETT[1] & others.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0.

The plaintiff, G. Saif Sabree, is currently an inmate at the Massachusetts Treatment Center (MTC). Representing himself, he filed a complaint against the defendants in Superior Court seeking declaratory and injunctive relief from alleged discriminatory practices. Sabree sought to bring the action "on behalf of himself and all other black prisoners, presently, formerly and who may be similarly situated in the future at

[1] Individually and in his official capacity as Secretary of the Executive Office of Public Safety and Security.

[2] Thomas A. Turco III, Commissioner of the Department of Correction; Steven J. O'Brien, superintendent of the Massachusetts Treatment Center; Steven H. Wheeler, president and chief operating officer of MHM Correctional Services, Inc.; George Johns, regional vice president of MHM Correctional Services, Inc.; and Kimberly Lyman-Julius, program director of MHM Correctional Services, Inc., individually and in their official capacities.

[MTC]." Upon the defendants' motions, the complaint was dismissed. We affirm.

In his complaint, Sabree claimed that the defendants engaged in race and gender discrimination against him and other black inmates committed to MTC. In particular, he alleged that, in a facility with mostly white female staff members, he and the other black male inmates are subjected to more stringent treatment parameters than are white inmates. As a result, he claimed, black prisoners are less likely to complete the sex offender treatment program as compared to white inmates, and thereby are less likely to qualify for parole, transfer to other facilities, and other privileges. Sabree also alleged that black inmates are less likely to secure high-paying job assignments than white inmates, and that sex offenders of all races are treated unfairly as a result of restrictions on their access to lower security housing.

At the time that Sabree filed his complaint, three of the defendants were employed by the Department of Correction (DOC defendants) and three were employed by MHM Correctional Services, Inc., a privately owned company that administers the sex offender treatment program at MTC (MHM defendants). Both the DOC and the MHM defendants moved to dismiss Sabree's complaint. The judge below allowed the defendants' motions to dismiss, ruling that:

> "After a hearing and careful consideration of the parties' written submissions, this motion is ALLOWED insofar as Plaintiff's complaint contains no allegations of discrimination directed at Plaintiff, nor does the complaint allege any actual damages suffered by Plaintiff. The complaint makes unsupported and conclusory allegations, and fails to make any allegations against a number of defendants aside from identifying them as parties. Plaintiff has furthermore failed to exhaust his administrative remedies. Finally, the court finds for all the reasons stated [in MHM'S Motion to Dismiss Complaint Pursuant to G. L. c. 231, § 6F], that Plaintiff raises a serious issue concerning an abuse of the justice system through his repeated filing of frivolous pleadings. Continuing to do so may cause the court to impose sanctions."[3]

"We review the allowance of a motion to dismiss de novo," Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011), accepting as true the facts alleged in the plaintiff's complaint and any favorable inferences that reasonably can be drawn from them. See Lopez v. Commonwealth, 463 Mass. 696, 700-701 (2012). "What is required at the pleading stage are factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief. . . ." Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level. . . ." Twombly, supra at 555.

[3] In their motion to dismiss, the MHM defendants indicated to the court that including the present action, Sabree had filed at least ninety lawsuits.

On appeal, Sabree argues that the judge erred in dismissing his complaint before allowing him to pursue discovery and without first ruling on his motion for class certification. Notably, Sabree does not dispute the judge's determination that, beyond naming them as parties, he failed to identify in his complaint how the DOC or MHM defendants engaged in gender or race-based discrimination against him. Nor does Sabree dispute that he failed to plead any personal injury or harm as a result of this alleged discrimination. Indeed, Sabree's complaint contains no factual allegations regarding how this alleged discrimination at MTC personally harmed him; instead, the complaint consists of generalized statements regarding discriminatory practices there. The judge correctly determined that the complaint failed to set forth facts raising a reasonable expectation that discovery would reveal evidence of the alleged misconduct. See Iannacchino, 451 Mass. at 636.

Furthermore, Sabree does not dispute that he failed to exhaust his administrative remedies before bringing this action, as required under State and Federal law. See G. L. c. 127, §§ 38E, 38F; and 42 U.S.C. § 1997e(a) (2000), the Federal Prison Litigation Reform Act. Even assuming, arguendo, that Sabree's complaint adequately pleaded facts suggesting an entitlement to relief, his failure to exhaust administrative remedies alone warranted a dismissal of his claims. See Ryan v. Pepe, 65 Mass.

App. Ct. 833, 839 (2006) ("Both Federal and State law now expressly require inmates to exhaust available grievance procedures before going to court"). Accordingly, we discern no error in the judge's decision to dismiss Sabree's claims or her decision to do so without first ruling on the motion for class certification.[4]

Judgment affirmed.

By the Court (Vuono, Milkey & Desmond, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 20, 2020.

[4] Insofar as Sabree can be taken to raise additional issues on appeal, his remaining contentions do not rise to the level of appellate argument, and we do not address them. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993). In any event, "our review of the record shows that none of [the remaining contentions have] merit." Id.

[5] The panelists are listed in order of seniority.