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United States District Court, D. Rhode Island.

Charles PONA, Plaintiff,
v.
Assistant Director James WEEDEN, et al.,
Defendants.

C.A. No. 16-612S
|
Signed 06/29/2017

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REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge

***1** Before the Court is the motion to dismiss of all remaining Defendants, Assistant Director James Weeden, Warden Matthew Kettle, Deputy Warden Jeffrey Aceto, Lieutenant Oden, Investigator Nuno Figueredo and Investigator David Perry, all of whom are sued in their individual capacities and in their official capacities with the Rhode Island Department of Corrections ("Defendants" or "RIDOC").[1] They ask the Court to dismiss the complaint of Plaintiff Charles Pona for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and because it fails to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). The motion has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons that follow, I recommend that the motion be granted, with leave to file an amended complaint.

I. BACKGROUND[2]

Plaintiff is serving two consecutive life sentences at the Adult Correctional Institutions ("ACI") for the 1999 murder of seventeen-year-old Hector Feliciano and the 2000 murder of fifteen-year-old Jennifer Rivera; the latter was shot while skipping rope because she was about to testify against Plaintiff during his trial for the Feliciano murder.[3] State v. Pona, 66 A.3d 454 (R.I. 2013); State v. Pona, 948 A.2d 941 (R.I. 2008); State v. Pona, 926 A.2d 592 (R.I. 2007). This case arises from a disciplinary proceeding at the ACI brought against Plaintiff after an intricate and extensive investigation into heroin trafficking in the "Maximum Security" area of the ACI. ECF No. 1-2. Plaintiff was charged as the orchestrator of the trafficking operation. ECF No. 1-2. Also implicated, by what prison officials characterize as "overwhelming evidence," was Plaintiff's mother, Carol Lee Pona. ECF Nos. 1-2, 1-12.

While the heroin trafficking in Maximum Security was being investigated, Plaintiff was transferred from that area of the ACI to another area, "High Security," where he remained for forty-three days. ECF No. 1 ¶¶ 1-5. The complaint does not allege that any punitive sanctions were imposed during this period. After he was brought back to Maximum Security on May 29, 2014, he was placed in segregation and, on May 30, 2014, he was formally charged with "narcotics trafficking." ECF No. 1 ¶¶ 6-10, 73; ECF No. 1-2. Prior to the hearing, Plaintiff was permitted to speak with a classification counselor; he claims she told him he would be found guilty. ECF No. 1 ¶¶ 24-26. Following a hearing held on the morning of June 3, 2014, before a single hearing officer, Plaintiff was found guilty and sanctioned with one year of disciplinary confinement ("segregation") and one year's loss of good time credit. ECF No. 1-4. Plaintiff alleges that he pled not guilty, but his request to see the evidence against him was denied. ECF No. 1 ¶¶ 27-33. He charges that the hearing officer did not review the evidence, but relied only on the discipline report. ECF No. 1 ¶¶ 34-36. All of this, he claims, is in violation of the "Morris Rules" established by Morris v. Travisono, 310 F. Supp. 857, 872-74 (D.R.I. 1970). ECF No. 1 ¶¶ 22, 27-30. The complaint also alleges that narcotics trafficking had been treated by the ACI as a less serious offense and was upgraded to an offense to be sanctioned by up to 365 days in segregation only three months before Plaintiff was charged. ECF No. 1 ¶¶ 16-17; ECF No. 1-14. Attached to the complaint is a

RIDOC communication to Plaintiff stating that this change was made in January 2014, and "You and your conspirators were given notice of this change." ECF No. 1-10.

***2** After Plaintiff challenged the length of the sentence,[4] on June 12, 2014, a second hearing was held before a different hearing officer and Plaintiff was again found guilty. ECF Nos. 1-3, 1-5. This time the sanctions were not only one year of segregation and loss of good time, but also a one-year loss of visits. ECF No. 1-5 at 3. Plaintiff appealed again, focusing on the lack of proof that he was found with heroin in his possession, as well as on the unfairness of a shorter segregation sanction given to another inmate for the same charge. ECF No. 1-6. Following further review by the Warden and Acting Assistant Director, the appeal was denied. ECF Nos. 1-7, 1-8. Plaintiff's third appeal asked the Warden to "review the evidence, which I'm sure will show I had no involvement," because it was "guilt by association." ECF No. 1-9. The appeal was denied but Plaintiff was reminded of his right to have his commitment to segregation reviewed every ninety days and potentially reduced. ECF No. 1-10.

After serving approximately seven and a half months in segregation, the discipline was terminated early and Plaintiff was returned to High Security.[5] ECF Nos. 1 ¶ 73, 1-11 at 4. While in segregation, he alleges that he was never permitted to go outdoors for exercise, to have newspapers, paperback books or personal pictures or to attend Islamic religious services with the general population. ECF No. 1 ¶¶ 60-72. After he was released from segregation, the sanction of no visits for one year commenced; it was also terminated early, after ten months, ECF No. 1 ¶¶ 74-78 & n.* (on page 11), except that Plaintiff's mother remained barred as a "threat to the security of the facilities," because of her "complicity in the narcotics trafficking scheme." ECF No. 1-12; see ECF No. 1-13.

Unpacking Plaintiff's somewhat confusing articulation of claims,[6] it appears that he alleges that the length of his disciplinary confinement, loss of visiting privileges, loss of good time credit and the way the disciplinary hearing was conducted all violated the Morris Rules, as well as his due process rights. Plaintiff marshals the First Amendment to challenge the denial, while in segregation, of his ability to have newspapers, paperback books and photographs, and to participate in Islamic group worship. In addition, Plaintiff contends that the ban on visits by his mother "unnecessarily deprived him of his institutional privilege to visit with his biological mother." ECF No. 1 at 15 ¶ H. Finally, Plaintiff claims that, while in segregation, he was deprived of all outdoor recreation, which the Court assumes he alleges amounts to cruel and unusual punishment pursuant to the Eighth Amendment. The complaint states, "This plaintiff was understandably placed in a restrictive status when (R.I.D.O.C.) officials allegedly received information indicating that this plaintiff was involved in illegal narcotics trafficking, and that the alleged narcotics were being introduced to the prison through this plaintiff." ECF No. 1 at 17. Plaintiff alleges that he filed the suit to challenge Defendants' failure "to follow the rule of law and their own stated policies."

***3** Defendants have challenged the viability of Plaintiff's pleading with the filing of this motion to dismiss. The motion contends that the Court lacks subject matter jurisdiction to consider Plaintiff's individual claims based on the Morris Rules and that the balance of the complaint fails to state a plausible claim for relief.[7]

II. STANDARD OF REVIEW

When the court's jurisdiction is challenged by a motion to dismiss pursuant to a Fed. R. Civ. P. 12(b)(1), the Court must credit the pleaded factual allegations as true and draw all reasonable inferences from them in the nonmoving party's favor. Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001). However, federal courts are courts of limited jurisdiction and it is the plaintiff who "bears the burden of proving its existence." Pejepscot Indus. Park, Inc. v. Me. Cent. Railroad Co., 215 F.3d 195, 200 (1st Cir. 2000).

As required by Fed. R. Civ. P. 12(b)(6), the complaint must give Defendants fair notice of what the claim is and the grounds on which it rests, and allege a plausible entitlement to relief. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 559 (2007). The plausibility inquiry requires the Court to distinguish "the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012). The Court must then determine whether the factual allegations are sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011) (quoting

Iqbal, 556 U.S. at 678) (internal quotation marks omitted). The complaint should not be read "too mechanically"; rather, it should be considered holistically with a heavy dose of common sense. Rodriguez-Vives v. P.R. Firefighters Corps of P.R., 743 F.3d 278, 283 (1st Cir. 2014). "The Court must accept a plaintiff's allegations as true and construe them in the light most favorable to the plaintiff, and review pleadings of a pro se plaintiff liberally." Tucker v. Wall, No. 07-406 ML, 2010 WL 322155, at *8 (D.R.I. Jan. 27, 2010). A *pro se* complaint is held to a less stringent standard than one drafted by a lawyer and is to be read with an extra degree of solicitude. Haines v. Kerner, 404 U.S. 519, 520 (1972); Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991).

III. ANALYSIS

A. Subject Matter Jurisdiction Over Morris Rules Violations

The Morris Rules were initially drafted by this Court in a 1970 decision, Morris v. Travisono, 310 F. Supp. 857, 872-74 (D.R.I. 1970). The new procedures were issued as part of an interim decree that served to settle, at least temporarily, a civil rights suit over prison conditions brought by a group of prisoners at the ACI. In the final 1972 decree, the Court refrained from issuing an injunction because the prison administration agreed to promulgate the Rules within ninety days. Morris v. Travisono, 373 F. Supp. 177, 179 (D.R.I. 1974). In October 1972, the Rules were promulgated pursuant to the Rhode Island Administrative Procedures Act ("APA"), R.I. Gen. Laws § 42-35-1 *et seq.*, and filed with the Secretary of State. Id. In 1973, the Department of Corrections suspended the Morris Rules following a serious prison riot and two subsequent deaths at the ACI. When the Morris Rules were not reinstated following this series of emergencies, the prisoner-litigants returned to the Court seeking relief, and the Court responded by enjoining prison officials from further suspending the Rules. Morris v. Travisono, 373 F. Supp. 177, 185 (D.R.I. 1974), aff'd, 509 F.2d 1358 (1st Cir. 1975). In an addendum, the Court noted the importance of creating a procedure for "changing or modification of the Rules by the prison officials" without involving the Court, and stated its intention to generate a procedural guideline for these kinds of changes. Id. When this decision was affirmed by the First Circuit, that Court emphasized the inappropriateness of restricting the ability of prison officials to make a wide range of decisions not of constitutional dimension and stated further that "not all changes in the Morris Rules should require its [the Court's] approval." Morris v. Travisono, 509 F.2d 1358, 1362 (1st Cir. 1975).

***4** Since that time, this Court has acknowledged that, "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene." Cugini v. Ventetuolo, 781 F. Supp. 107, 114 (D.R.I. 1992) (quoting Johnson v. Avery, 393 U.S. 483, 486 (1969), aff'd, 966 F.2d 1440 (1st Cir. 1992)). Accordingly, the Court held that "state prisoner actions alleging violations of the Morris rules or seeking enforcement of those rules properly belong in state court because the rules were promulgated under state law and were meant to be dealt with by state machinery." Id. at 113. In 2001, this Court confirmed that "this court lacks subject matter jurisdiction to entertain such claims brought under the so called *Morris* rules." Doctor v. Wall, 143 F. Supp. 2d 203, 206-08 (D.R.I. 2001) ("Essentially, inmates at the ACI are attempting to turn the U.S. District Court into an appellate review board for classification and disciplinary procedures at the ACI established under *Morris* rules."). Based on these binding decisions, the Morris Rules have been determined to be state rules, "to be enforced, if at all, by state machinery." Doctor, 143 F. Supp. 2d at 204.

Plaintiff argues that this Court should consider his claim that his disciplinary hearing was not in compliance with the Morris Rules because the Rhode Island Supreme Court ruled in 1998 that the provisions of the Rhode Island APA are not applicable to judicial review of the Department of Corrections' classification and disciplinary proceedings, or its rule-making powers. L'Heureux v. State Dep't of Corr., 708 A.2d 549, 552 (R.I. 1998). As Plaintiff describes it, L'Heureux has created "jurisdictional 'ping pong,' " with the federal court holding that it does not have the jurisdiction to enforce the Morris Rules and the state courts refusing to enforce them. ECF No. 15 at 8.

Plaintiff's argument does not consider the analytical underpinnings of L'Heureux, including its reliance on the Eleventh Amendment to the United States Constitution, which precludes federal courts from determining whether state officers have failed to comply with state law. Id. at 551. Equally important is L'Heureux's focus on the long

line of post-Morris decisions issued by the United States Supreme Court, which make clear that the Morris Rules are not grounded in the requirements of the Constitution. Id. at 551-52 ("the director of the DOC had unfettered discretion in making classification determinations and ... as a consequence no protected liberty interest in such classification determinations existed." A Fourteenth Amendment liberty interest we held "arises only when a state places substantive limits on official discretion....") (citing Sandin v. Conner, 515 U.S. 472 (1995) and other decisions). This Court must defer to L'Heureux's interpretation of Rhode Island law as excluding internal ACI rule-making, classification and disciplinary proceedings from the scope of the APA. 708 A.2d at 553. Similarly, this Court must defer to the L'Heureux holding that, absent a constitutional or statutory liberty interest, the Morris Rules are not enforceable as a matter of state administrative procedure. 708 A.2d at 552-53.

Also unavailing is Plaintiff's reliance on Cook v. Wall, C.A. No. 09-169S, 2013 WL 773444 (D.R.I. Feb. 28, 2013). Cook holds only that segregated confinement may be "atypical" under Sandin, 515 U.S. at 472 ("atypical and significant" hardships imposed as prison discipline may implicate constitutionally guaranteed liberty interest), in part because of non-compliance with the Morris Rules, but primarily because the plaintiff had claimed that he was afforded no hearing before being placed in segregation and that he was placed in segregation to retaliate against him for publicly criticizing RIDOC policy. Id., at *2. Moreover, he was serving a relatively short sentence, which distinguished him from prisoners such as the plaintiff in Sandin, who had been sentenced to thirty years to life. Id. As to the latter point, Cook notes that an extended segregation sanction, which may be typical for a lifer, might appear atypical if imposed on someone incarcerated for a relatively short period for a non-violent offense. Id. Thus, Cook does not apply to Plaintiff who, as a convicted murderer/double lifer, fits neatly into the Sandin fact pattern.

***5** At bottom, the cases from this Court are clear: this Court lacks subject matter jurisdiction over alleged violations of the Morris Rules, whether brought as a motion for contempt or as a § 1983 claim, which is what Plaintiff has asserted here.[8] Cugini v. Ventetuolo, 966 F.2d 1440, *3 (Table) (1st Cir. 1992) (whether brought as motion for contempt or § 1983 action, it is plain that the Morris Rules complaint fails to state claim). And as state law claims, the Morris Rules are not enforceable and therefore cannot support a viable pendent claim under L'Heureux. Accordingly, I recommend that Plaintiff's claims based on alleged violations of the Morris Rules should be dismissed. See Akinrinola v. Wall, C.A. No. 6-370M, 2016 WL 6462203, at *1 (D.R.I. Oct. 31, 2016).

B. Procedural Due Process Violations

In its watershed Sandin decision, the Supreme Court held that, for prisoners, "The Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed." Sandin, 515 U.S. at 480. In so holding, the Court confirmed that an inmate does not have a due process right to remain in a prison's general population. Id. (citing Meachum v. Fano, 427 U.S. 215, 225 (1976) ("That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated.")). Sandin further established the guiding principle that the due process clause will not be implicated unless prison officials impose a punishment that is "an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. This is because " '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' " Goddard v. Oden, C.A. No. 15-055ML, 2015 WL 1424363, at *2 (D.R.I. Mar. 27, 2015) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)). As long as the discipline "falls within the expected perimeters of the sentence imposed by a court of law," no liberty interest is implicated and due process rights do not accrue. Id. "Only changes in prison conditions resulting from discipline imposed without appropriate due process that constitute 'atypical' and 'significant' hardships sufficient to give rise to the loss of a liberty interest are potentially actionable under § 1983." Id.

Accordingly, Plaintiff's due process challenge to his transfer from Maximum Security to High Security for forty-three days while the officials conducted the investigation of the heroin trafficking in Maximum Security is not actionable. While the transfer process may not have been consistent with the Morris Rules,[9] it clearly is not actionable in light of Meachum, as confirmed by Sandin. It is well settled that the transfer of a prisoner from one facility to another is not protected by the due process clause. Meachum, 427 U.S. at 225. This aspect of Plaintiff's claim should be dismissed for failure to state a claim. Morgan v. Wall, C.A. No. 10-241S, 2010 WL

3767691, at *3 (D.R.I. Aug. 31, 2010) (due process clause does not "afford a prisoner a liberty interest in avoiding transfer to more adverse conditions or confinement"); Briggs v. Wall, C.A. No. 09-456S, 2009 WL 4884529, at *4 (D.R.I. Dec. 16, 2009) (claim regarding change in classification to High Security dismissed; no violation of procedural due process for "placing him in the High Security Center without classification board hearing").

***6** Next, and more substantively, Plaintiff raises the due process deprivation arising from his alleged denial of sufficient access to the evidence against him at the two disciplinary hearings. Based on this alleged due process lapse, he attacks the imposition of the sanction of one year of segregation, of which seven and a half months were served, followed by a loss of visiting privileges.[10] This aspect of Plaintiff's complaint fails because neither one year or less of segregation nor the loss of visiting privileges, when imposed to sanction conduct that involved abuse of those privileges, amount to an "atypical and significant hardship on the inmate...." Sandin, 515 U.S. at 484.

Focusing first on Plaintiff's seven and a half months[11] in segregation, courts in this district and elsewhere have repeatedly held that placement in punitive segregation for up to one year is not sufficient to implicate a liberty interest. Benbow v. Weeden, C.A. No. 13-334ML, 2013 WL 4008698, at *4 (D.R.I. Aug. 5, 2013); see, e.g., Griffin v. Vaughn, 112 F.3d 703, 708-09 (3d Cir. 1997) (disciplinary detention for fifteen months not atypical); Harris v. Perry, C.A. No. 15-222ML, 2015 WL 4879042, at *6 (D.R.I. July 15, 2015) (plaintiff must plead more than placement in disciplinary segregation for 365 days as sanction for narcotics trafficking); Lewis v Williams, No. Civ.A. 07-1592(GEB), 2007 WL 1308309, at *8 (D.N.J. May 2, 2007) (fifteen days of disciplinary detention and one year of disciplinary segregation do not trigger protections of due process clause). The characteristics of segregation found potentially "atypical" may be illustrated by Arauz v. Bell, in which the plaintiff was found not guilty after the hearing officer's finding was reversed, but was placed in administrative segregation indefinitely with no periodic review hearings, and remained there for nearly two years. 307 Fed.Appx. 923, 930 (6th Cir. 2009).

Plaintiff seeks to rebut the holdings of these cases by pointing to the "fact intensive inquiry" called for by the Second Circuit, which he argues precludes Fed. R. Civ. P. 12(b)(6) dismissal of cases raising Sandin challenges to segregation. See Palmer v. Richards, 364 F.3d 60, 65-66 (2d Cir. 2004) (dismissal of due process claims only in cases where the period of time spent in segregation exceedingly short and no indication that plaintiff endured unusual conditions). This Court's research reveals that Palmer has never been adopted either by the First Circuit or by district courts within this Circuit. Accordingly, I decline to be bound by its interpretation of Sandin.

The other sanction that Plaintiff claims was imposed without procedural due process is the ten-month loss of visiting privileges.[12] This claim is unavailing. It is well settled that a prisoner's loss of visiting privileges is a typical aspect of prison life, which, standing alone, is insufficient to give rise to due process rights. Henry v. Dep't of Corr., 131 Fed.Appx. 847, 850 (3d Cir. 2005) (permanent restriction to non-contact visitation only as sanction for drug-related disciplinary offense was not atypical hardship); see Overton v. Bazzetta, 539 U.S. 126, 134 (2003) (restrictions on visits to inmates with in-prison substance abuse violations found constitutionally acceptable). As this Court has held, "Prisoners have no associational right to receive visitors, whether it be a spouse, children, or anyone else ..."; the right to meet and visit with whomever a prisoner chooses is terminated by the criminal trial. Dewitt v. Wall, C.A. No. 01-65T, 2001 WL 1136090, at *3 (D.R.I. July 31, 2001), aff'd, 41 Fed.Appx. 481, 482 (1st Cir. 2002).

***7** Based on the foregoing analysis, I recommend that all of Plaintiff's due process-based challenges to the sanctions imposed based on narcotics trafficking be dismissed because they do not implicate a liberty interest as required by Sandin, or because they otherwise fail to state a claim.

C. First Amendment Violations—Ban on Newspapers, Books and Photographs

Plaintiff alleges that his First Amendment rights have been violated because, during the seven and a half months of segregation, he was not able to receive newspapers or keep paperback books and pictures of his loved ones. Importantly, the complaint does not allege that he was denied access to all reading materials.

With regard to newspapers, books and pictures, it is long settled that, while inmates do have a limited First Amendment right to possess reading material, a policy that restricts certain reading materials and photographs

available to an inmate in segregation is not constitutionally deficient as long as it is "reasonably related to the deterrence of bad behavior and the maintenance of order and security in a prison, as applied to intransigent inmates." Beard v. Banks, 548 U.S. 521, 530-33 (2006) (no First Amendment violation where denial of all access to newspapers, magazines and photographs for "intractable" inmates in long-term segregation reasonably related to legitimate interests in providing incentives for better prison behavior); see, e.g., Sizemore v. Williford, 829 F.2d 608, 610 (7th Cir. 1987) (non-content-based disruption in inmate's reading materials does not violate First Amendment); Anctil v. Fitzpatrick, 1:16-CV-00107-JAW, 2016 WL 6205755, at *4 (D. Me. Oct. 24, 2016) (denial of newspaper access for two-week period in segregation does not violate Constitution), adopted, 2016 WL 7076993 (D. Me. Dec. 5, 2016); Podkulski v. Doe, Civil No. 11-cv-102-JL, 2011 U.S. Dist. LEXIS 154781, at *20-23 (D.N.H. Dec. 20, 2011) (policy of restricting reading materials available to inmate in segregation reasonably related to the deterrence of bad behavior and maintenance of order and security in a prison, as applied to intransigent inmates). Further, in addressing limits placed on access to reading materials, the Court must accord prison administrators significant deference in defining legitimate goals for the corrections system, and for determining the best means of accomplishing those goals. Starr v. Moore, No. 09-CV-440-JL, 2010 WL 3002107, at *4 (D.N.H. July 27, 2010), adopted, 2010 WL 3282573 (D.N.H. Aug. 18, 2010). Limiting the access to reading materials of prisoners with the most serious behavioral problems is consistent with the exercise of an appropriate experience-based professional judgment by prison officials seeking to further legitimate prison objectives. Beard, 548 U.S. at 533.

As pled, Plaintiff's allegation based on the denial of access to certain types of reading material and pictures while he was in segregation for narcotics trafficking fails to state a claim because the complaint does not plausibly describe how the limitation went beyond what is reasonably related to legitimate correctional goals, including the goal of deterring bad behavior. Beard, 548 U.S. at 530-33. Accordingly, I find that the complaint fails to state a viable claim that the restriction of the reading materials and photographs during punitive segregation violated the First Amendment. Based on that finding, I recommend that all such claims be dismissed.

D. First Amendment Violations—Ban on Attendance at General Population Religious Services

***8** Plaintiff alleges that his First Amendment rights have been violated because he was not permitted to attend Islamic religious services with the general population while in segregation for orchestrating a heroin trafficking scheme. The complaint does not allege that he was prohibited from practicing his religion in his own cell, during his recreation time, or by having a clergy member of his professed religion visit him at his cell. Nor does it plausibly allege that this limited restriction on the practice of his religion was not reasonably related to the prison's legitimate security interests. See Crittendon v. Campbell, No. 2:05-cv-0845-WKW, 2007 WL 2853398, at *7 (M.D. Ala. Sept. 27, 2007) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)). Here the security concern arising from Plaintiff mixing with the general prison population is apparent from the face of the complaint, which alleges that prison officials found that he had caused a serious threat to safety and security by orchestrating narcotics trafficking. See Arauz, 307 Fed.Appx. at 928 (if security concerns prevent prison officials from permitting inmate access to religious services while in segregation, such deprivation does not violate First Amendment as long as individual religious counseling permitted).

Based on the foregoing, I find that the complaint as crafted, even when construed liberally, fails to state a plausible violation of Plaintiff's First Amendment right to practice his religion arising from a restriction that the complaint itself establishes is appropriately related to institutional security: "group activities in prison ... are subject to reasonable regulation to insure the security and safety of the institution, staff, and the inmates, and are not constitutionally guaranteed." Proverb v. O'Mara, Civil No. 08-CV-431-PB, 2009 WL 368617, at *11 (D.N.H. Feb. 13, 2009) (allegations based on ban on attendance at group bible study for inmate in segregation fails to state claim), adopted sub nom., Proverb v. Superintendent, HCDOC, 2009 WL 1292126 (D.N.H. May 6, 2009). Accordingly, I recommend that Plaintiff's First Amendment claims based on the ban on attendance at Islamic religious services with the general population during the period of punitive segregation be dismissed for failure to state a claim.

One matter remains for consideration. While Plaintiff does not cite the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, the Court has also questioned whether RLUIPA might give rise to a viable claim for an injunctive remedy (but not

damages),[13] arising from his inability to attend group religious services while in segregation. See Holt v. Hobbs, 135 S.Ct. 853, 860 (2015) (prison may not impose a "substantial burden on the religious exercise of a person" unless "in furtherance of a compelling government interest and ... the least restrictive means of furthering that compelling governmental interest"). The cases addressing this issue are mixed. Compare Gayle v. Harmon, 207 F. Supp. 3d 549, 554 (E.D. Penn. 2016) (restriction on attending services while in segregation, which was rationally related to legitimate penological interest, did not violate RLUIPA), with Shepherd v. Powers, 55 F. Supp. 3d 508, 519 (S.D.N.Y. 2014) (with no explanation for denying plaintiff access to church and Bible study programs while in segregation, summary judgment seeking dismissal of RLUIPA claim is denied), and Ajala v. West, No. 13-CV-545-BBC, 2014 WL 7338782, at *7 (W.D. Wis. Dec. 22, 2014) (RLUIPA may be violated by blanket prohibition against group worship for all prisoners in segregation). Nevertheless, the dangerous conduct that led to the sanction of segregation may well justify a limitation on access to group services, as long as other religious practice is permitted. See Ajala v. Boughton, No. 13-CV-545-BBC, 2015 WL 1814946, at *4 (W.D. Wis. Apr. 22, 2015) (prohibition on participation in group worship by plaintiff in segregation for gang-related conduct does not violate RLUIPA). Further, the plaintiff whose misconduct justified denial of access to group services likely lacks standing to challenge a ban on such access for all prisoners in segregation, whether or not justified. Id., at *5.

***9** As a double lifer serving time in segregation for serious narcotics trafficking, Plaintiff probably does not have a viable RLUIPA claim, at least to the extent that the only burden on his religious practice is the ban on attendance at group services. By recommending that the Court afford him leave to amend, I hold open the possibility that he may be able to marshal facts sufficient state a plausible RLUIPA claim for injunctive relief.

E. Eighth Amendment Violations—Ban on Outdoor Recreation

Plaintiff alleges that during the seven and a half months of punitive segregation, he was never permitted to be outdoors and therefore was completely deprived of access to sun and fresh air. He notes that there is a caged outdoor recreational area at the facility, yet he was not permitted to use it. ECF No. 1 ¶¶ 66-68. While his complaint is not clear regarding the legal basis for this claim, I analyze it as arising under the Eighth Amendment, which prohibits prison conditions that are inhumane and prison officials who are deliberately indifferent to inhumane conditions. Wilson v. Seiter, 501 U.S. 294, 302-03 (1991).

Generally, "[w]hile the constitution does not compel prisons to provide inmates with outdoor exercise, 'the near-total deprivation of the opportunity to exercise may violate the Eighth Amendment unless the restriction relates to a legitimate penological purpose.' " Graham v. Grondolsky, CA No. 08-420208-MBB, 2012 WL 405459, at *13 (D. Mass. Feb 7, 2012). As articulated by the Seventh Circuit, the deprivation of indoor and outdoor recreation for a prisoner in protective segregation imposes "inconvenience and discomfort, both of which fall outside the eighth amendment." Harris v. Fleming, 839 F.2d 1232, 1236 (7th Cir. 1988); see Torres Garcia v. Puerto Rico, 402 F. Supp. 2d 373, 383 (D.P.R. 2005) (limitation of out-of-cell exercise to one hour per week is not unconstitutional *per se*). On the other hand, the Ninth Circuit has held that the denial of any outdoor exercise for prisoners in segregation for far longer than one year should trigger Eighth Amendment scrutiny. Toussaint v. Yockey, 722 F. 2d 1490, 1493 (9th Cir. 1984).

Plaintiff's complaint alleges that it would have been easy for ACI staff to allow him to exercise in the caged area, but does not claim that he suffered any ill effects from the deprivation. Further, his complaint seems to focus on outdoor exercise, suggesting that some exercise was permitted. Without more factual detail sufficient to make it plausible that the circumstances of his segregation amounted to cruel and unusual punishment, U.S. Const. amend. VIII, I recommend that Defendant's motion to dismiss the Eighth Amendment claim based on the denial of outdoor exercise during segregation be dismissed.

IV. CONCLUSION

Based on the foregoing, I recommend that Defendants' Motion to Dismiss (ECF No. 12) be granted. However, because Plaintiff may be able to cure the deficiencies in his pleading by alleging additional facts as to certain of his claims (or to support a RLUIPA claim), I recommend that this Court provide him with thirty days from the adoption of this report and recommendation to file an amended complaint. Brown v. Rhode Island, 511

Fed.Appx. 4, 5, 7 (1st Cir. 2013) (per curiam).

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

All Citations

Not Reported in Fed. Supp., 2017 WL 3279012

Footnotes

1 Deputy Warden Michelle Auger has retired from her position at the ACI; she has not been served and is no longer a defendant in the case.

2 As required for a motion to dismiss, the facts that follow are limited to those alleged in Plaintiff's complaint, ECF No. 1, and the attachments to it, ECF Nos. 1-2 to 1-14. Where indicated, I also refer to background that appears in the published decisions from Plaintiff's underlying criminal cases. State v. Pona, 66 A.3d 454 (R.I. 2013); State v. Pona, 948 A.2d 941 (R.I. 2008); State v. Pona, 926 A.2d 592 (R.I. 2007).

3 Plaintiff is also serving an array of other sentences of varying lengths for crimes arising out of the two murders, including conspiracy to commit murder, carrying an unlicensed pistol, use of a firearm during a crime of violence obstruction of justice and attempted arson of a motor vehicle. See Pona, 66 A.3d at 465; Pona, 926 A.2d at 599.

4 Plaintiff's first appeal argued that he should have been sentenced more leniently because he was never caught with the heroin in his possession, because the confidential informants' credibility was not contested, because of the unfairness arising from the recent change in the severity of the sanction for drug trafficking, and because of his relatively trouble-free behavior prior to this incident. ECF No. 1-3.

5 Plaintiff's complaint refers to nine months, ECF No. 1 ¶ 73, but also provides the actual starting and ending dates, which makes clear that he actually served seven and a half months in segregation. Id. It is possible that the reference to nine months includes the forty-three days in High Security before he was placed in segregation.

6 Because Plaintiff is *pro se,* I have employed a liberal construction of his filings. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520–21 (1972); Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 23 (1st Cir. 2000); Winston v. Auger, CA No. 15-204 S, 2015 WL 6696575, at *4 n.3 (D.R.I. Nov. 3, 2015).

7 When the complaint was screened, as required by 28 U.S.C. § 1915(e)(2) and 28 U.S.C. § 1915A(b), the Court found that Plaintiff had "stated sufficient facts for his Complaint to proceed." See 28 U.S.C. § 1915A. However, screening does not foreclose Defendants from filing a motion to dismiss for failure to state a cognizable claim. Martinez v. Blanchette, C.A. No. 14-537L, 2015 WL 9315562, at *1 n.2 (D.R.I. Oct. 29, 2015), adopted, 2015 WL 9412531 (D.R.I. Dec. 22, 2015) (quoting Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007) ("a defendant's right to bring a motion to dismiss is not foreclosed by the issuance of a sua sponte screening providing that the prisoner has stated a claim ...")).

8 Plaintiff's brief adverts to a motion for civil contempt based on the failure to follow the Morris Rules. ECF No. 15 at 10-11. No such motion has been referred to me, nor is one pending in this case. Therefore, the issue of contempt is not included in this report and recommendation.

[9] It must be noted that Plaintiff's invocation of the Morris Rules in connection with this transfer is vague and conclusory; it is impossible to discern what is the claimed violation. If the Court had subject matter jurisdiction over alleged Morris Rules violations, I would recommend dismissal of this aspect of the claim for failure to state a clear and plausible claim as required by Twombly/Iqbal.

[10] Plaintiff also attacks the loss of good time credit. The cases interpreting Rhode Island's good time credit statute make clear that the loss of good time credit cannot form the basis for a viable claim, in that this consequence does not, as a matter of law, amount to the loss of a liberty interest. Benbow v. Weeden, C.A. No. 13-334ML, 2013 WL 4008698, at *4 (D.R.I. Aug. 5, 2013); Moore v. Begones, C.A. No. 09-543 S, 2010 WL 27482, at *4 (D.R.I. Jan. 4, 2010) (Rhode Island good time credit statute is discretionary and does not create a liberty interest); Almeida v. Wall, C.A. No. 08-184 S, 2008 WL 5377924, at *7 (D.R.I. Dec. 23, 2008) (same). Accordingly, Plaintiff's allegations regarding lost good time credit should be dismissed.

[11] Courts must focus on the duration of the actual punishment. See Scott v. Albury, 156 F.3d 283, 287-88 (2d Cir. 1998).

[12] Plaintiff also specifically challenges the ban on visits from his mother, but not on constitutional grounds. Rather, he claims that the ban on his mother as a visitor is contrary to ACI institutional privileges. ECF No. 1 at 13 (¶ 7). This allegation is contradicted by Plaintiff's attachments to the complaint, which establish that a visitor who "pose[s] a threat to the security of the facility may be suspended or removed from visiting privileges," and that Plaintiff's mother was found to be such a threat because of her participation in narcotics trafficking. ECF No. 1-12, 1-13. This allegation fails to state a claim and should be dismissed. See Dewitt v. Wall, 41 Fed.Appx. 481, 482 (1st Cir. 2002) (policy restricting visits for reasons rationally connected to legitimate concerns about prison security may be enforced without transgressing constitution).

[13] See Sossamon v. Texas, 563 U.S. 277, 288 (2011).