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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

Mutulu Shakur,

Plaintiff,

v.

Louis Milusnic, Warden, Bureau of Prisons, et al.,

Defendant.

Case No. 5:18-cv-00628-SVW (ASx)

DEFENDANTS FEDERAL BUREAU OF PRISONS'S AND WARDEN LOUIS MILUSNIC'S NOTICE OF MOTION AND MOTION TO DISMISS;

MEMORANDUM OF POINTS AND AUTHORITIES

[Fed. R. Civ. P. 12(b)(6)]

Hearing Date: October 29, 2018
Hearing Time: 1:30 p.m.
Location: Courtroom 10A
United States Courthouse
350 West First Street
Los Angeles, CA 90012

Honorable Stephen V. Wilson
United States District Judge

[1] Louis Milusnic is substituted for his predecessor, David Shinn. See Fed. R. Civ. P. 25(d).

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that, on October 29, 2018, at 1:30 p.m., or as soon thereafter as they may be heard before the Honorable Stephen V. Wilson, United States District Judge, in Courtroom 10A of the United States Courthouse, located at 350 West First Street, Los Angeles, California 90012, defendants the Federal Bureau of Prisons and Louis Milusnic, Warden, Bureau of Prisons, will, and hereby do, move this Court for an order dismissing plaintiff Mutulu Shakur's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Good cause exists to grant this motion. By this action, Plaintiff seeks declaratory relief invalidating a March 2013 disciplinary action by which the Bureau of Prisons concluded that Plaintiff violated an institution rule regarding telephone usage. Plaintiff's claim against the Bureau of Prisons and Warden Milusnic fails for three reasons. First, under the "favorable termination" doctrine, Plaintiff cannot maintain any claims for monetary or declaratory relief that, if successful, would imply the invalidity of a prison disciplinary action without first demonstrating that the disciplinary action has been overturned, either on appeal or by a writ of habeas corpus. Second, Plaintiff has failed to allege sufficient facts that, if accepted as true, would be sufficient to support any of the supposed defects with the 2013 disciplinary action. Third, even if Plaintiff had alleged sufficient facts to support the purported defects, the facts Plaintiff admits in his First Amended Complaint demonstrate adequate evidence to support the disciplinary action and, as a result, undermine any claim that Plaintiff did not receive sufficient process. For these reasons, the Bureau of Prisons and Warden Milusnic request that the Court grant this Motion and dismiss Plaintiff's First Amended Complaint.

This Motion is made based on this Notice, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Timothy D. Biché and Request for Judicial Notice, all pleadings, records, and other documents on file with the Court in this action, and on such oral argument as may be presented at the hearing of this Motion.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3, which counsel for t the Federal Bureau of Prisons and Louis Milusnic, Warden, Bureau of Prisons, initiated by letter on September 10, 2018.

Dated: September 17, 2018

Respectfully submitted,

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/s/ Timothy D. Biché
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United States Parole Commission

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiff Mutulu Shakur is serving a 60-year prison sentence for, among other crimes, participating in a racketeering enterprise and bank robbery murder. While serving his sentence, Plaintiff has been found to have violated a number of rules of the institutions in which he has been housed. Most recently, after a disciplinary hearing in March 2013, Plaintiff was found to have violated Bureau of Prisons rule 297, which prohibits inmates from using prison phones in a way that prevents BOP staff from monitoring to whom the inmate is speaking. See 28 C.F.R. § 541.3 (rule 297). As a result of this disciplinary action, Plaintiff was deprived of good-time credits. Additionally, the 2013 disciplinary action was considered by the United States Parole Commission in denying Plaintiff's requests for "mandatory" parole in April 2016 and May 2018.

In his First Amended Complaint, Plaintiff alleges one claim for relief against the Bureau of Prisons and Louis Milusnic, Warden of FCI Victorville, by which he asks this Court to invalidate the 2013 disciplinary action. See First Am. Compl., Dkt. 20, ¶¶ 148–152, pp. 87–88, no. 10. This claim fails for a number of reasons. First, Plaintiff's claim is barred by the "favorable termination" doctrine, which forecloses any claims for monetary or declaratory relief that would, if successful, necessarily invalidate a prison disciplinary action that has not previously been overturned on appeal or by a writ of habeas corpus. Second, Plaintiff has failed to alleged sufficient facts that, if accepted as true, would establish any of the purported defects with the 2013 disciplinary action. Finally, even if Plaintiff had alleged sufficient facts to support the supposed improprieties with the disciplinary action, Plaintiff's own admissions in the First Amended Complaint establish that the disciplinary action is supported by evidence and, as a result, he cannot state a claim that he was deprived of due process.

For these reasons, and as argued below, the United States Bureau of Prisons and Warden Louis Milusnic request that the Court grant this Motion and Dismiss Plaintiff's First Amended Complaint.

II. Statement of Facts

A. Plaintiff's Conviction and Sentence.

In 1988, Plaintiff was found guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, participating in a racketeering enterprise, bank robbery, armed bank robbery, and bank robbery murder. First Am. Compl., Dkt. 20, ¶¶ 42–44. As a result of this conviction, Plaintiff was sentenced to 60 years in federal prison.

B. Plaintiff's Violation of BOP Rules.

On February 5, 2013, while incarcerated at FCI Victorville, Plaintiff called Karin Stanford, a professor at California State University, Northridge. Id. ¶ 85. Professor Stanford then placed Plaintiff on speakerphone, and Plaintiff addressed a group of more-than 200 students and professors. Id. ¶ 86. The following day, a BOP officer reviewed Plaintiff's phone call and issued an incident report charging Plaintiff with violating BOP rules 212 and 297. Id. ¶ 87. BOP rule 297 prohibits "[u]se of the telephone for abuses other than illegal activity which circumvent the ability of staff to monitor frequency of telephone use, content of the call, or the number called; or to commit or further a High category prohibited act." 28 C.F.R. § 541.3.

On February 11, 2013, Plaintiff received a Notice of Disciplinary Hearing regarding the rule violations resulting from his February 5 phone call. First Am. Compl., Dkt. 20, ¶ 87. Plaintiff's disciplinary hearing was held on March 13, 2013 before Discipline Hearing Officer Diana Elliott. Id. ¶ 90. Officer Elliott has been a certified BOP Discipline Hearing Officer since 2003. Request for Judicial Notice, Dkt. 22-1, Ex. 1, ¶¶ 1, 16(B). Following the March 2013 hearing, Officer Elliott found that Plaintiff had violated BOP rule 297. First Am. Compl., Dkt. 20, ¶ 91.

C. Plaintiff's District Court Action.

Plaintiff brings this action against the BOP and Warden Milusnic to obtain "an order vacating" the March 2013 disciplinary action. Id. ¶ 93; see also id. pp. 87–88, no. 10. Plaintiff alleges that the March 2013 disciplinary action was invalid because

(1) his actions were not contrary to any BOP rule; (2) the BOP allegedly destroyed the tape of the recording prior to his disciplinary hearing; (3) the BOP allegedly has not charged "similarly situated prisoners" with rule violations; and (4) Officer Elliott was allegedly not qualified to serve as a Discipline Hearing Officer. Id. ¶¶ 148–51.

As a result of these alleged defects with the March 2013 disciplinary action, Plaintiff also alleges that he is "in custody in violation of the laws of the United States," and seeks an order from this Court releasing him from custody. Id. ¶ 152, p. 84, no. 1.

III. Legal Standard

A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) if its allegations fail to present a viable claim for relief. To survive a 12(b)(6) motion, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). A complaint should be dismissed if it simply "tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original).

While a court normally accepts factual allegations in a complaint as true, allegations contradicted by "matters properly subject to judicial notice or by exhibit" need not be accepted as true. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Under the "incorporation by reference" doctrine, a court may take judicial notice of documents "not physically attached" to the complaint when the contents of the documents "are alleged in [the] complaint" and "no party questions" the authenticity of the documents. Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); see also Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1160–61 (9th Cir. 2012) (affirming district court's taking judicial notice of extrinsic documents on motion to dismiss when documents were alleged in complaint and plaintiff did not challenge their authenticity). When the court considers an incorporated document, it may treat the document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006) (quotation omitted). Further, the court may consider documents incorporated by

reference without converting the motion to dismiss into a motion for summary judgment. United States v. Ritchie, 342 F.3d 903, 907–08 (9th Cir. 2003).

IV. Argument

A. Plaintiff's claim is barred by the "favorable termination" doctrine.

The "favorable termination doctrine" holds that "in order to recover damages for allegedly unconstitutional conviction or imprisonment . . . a plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, . . . , or called into question by a writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). In Edwards v. Balisok, 520 U.S. 641 (1997), the Supreme Court extended the favorable termination doctrine "to prison disciplinary actions that implicated the prisoner's term of confinement," and claims seeking declaratory relief. See Ramirez v. Galaza, 334 F.3d 850, 856 (9th Cir. 2003) (citing Edwards, 520 U.S. at 643–44). Accordingly, a prisoner who seeks monetary or other relief based on alleged defects in a prison disciplinary action that, if proven, would invalidate the result of the disciplinary action, must first prove that the disciplinary action has been overturned.

By his Second Claim for Relief, Plaintiff alleges a number of purported defects with the March 2013 disciplinary action. See First Am. Compl., Dkt. 20, ¶¶ 148–51. Under Heck and Edwards, Plaintiff cannot prevail on this claim because he cannot show that the March 2013 disciplinary action has been overturned on appeal or invalidated by a writ of habeas corpus.[2] Thus, Plaintiff's Second Claim for Relief is not cognizable and should be dismissed.

B. Plaintiff has failed to state a claim for relief against the Bureau of Prisons and Warden Milusnic regarding his 2013 rule violation.

Even if Plaintiff's challenge to the 2013 disciplinary action were cognizable, the Court should still dismiss that claim because Plaintiff has failed to allege facts that, if accepted as true, would be sufficient to state a valid claim. In his Second Claim for

[2] An inmate who seeks to challenge the "fact or duration of his confinement," must do so through a petition for a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 489 (1973).

Relief, Plaintiff identifies four supposed defects that purportedly warrant the invalidation of the 2013 disciplinary action: (1) his actions were not contrary to any BOP rule; (2) the BOP allegedly destroyed the tape of the phone call prior to his disciplinary hearing in violation of certain regulations; (3) the BOP allegedly has not charged "similarly situated prisoners" with rule violations; and (4) Officer Elliott was allegedly not qualified to serve as a Discipline Hearing Officer in his case. First Am. Compl., Dkt. 20, ¶¶ 148–51. Yet the facts alleged in Plaintiff's First Amended Complaint fail to support any of these purported defects.

First, while Plaintiff contends that his actions were not contrary to any BOP rule, the allegations in his First Amended Complaint belie this claim. Bureau of Prisons rule 297 prohibits the "[u]se of the telephone for abuses other than illegal activity which circumvent the ability of staff to monitor frequency of telephone use, content of the call, or the number called." 28 C.F.R. § 541.3. Plaintiff admits that on February 5, 2013, he called Professor Stanford and was then placed on speakerphone so that he could speak to a large group of people. Id. ¶ 85. Once Plaintiff was placed on speakerphone, there was no way for BOP staff to monitor to whom or to exactly how many people Plaintiff was speaking. By speaking to this large, unidentifiable group—which he does not deny doing—Plaintiff violated BOP rule 297. See id. Accordingly, Plaintiff's first challenge to the 2013 disciplinary action is unsupported.

Second, Plaintiff's argument that he was deprived of due process because the BOP allegedly destroyed the tape of the phone call in violation of several regulations, is similarly meritless. In order to state a claim arising from the alleged violation of a regulation, Plaintiff must allege that the supposed violation of the regulations prejudiced him. See Vargas v. U.S. Parole Comm'n, 865 F.2d 191, 194 (9th Cir. 1988) (affirming dismissal of claim arising from alleged violations of regulations where plaintiff "did not present evidence . . . to show that [the regulatory violation] caused prejudice"). Plaintiff has not alleged that the destruction of the recording has prevented himself from defending against the rule violation. Plaintiff does not dispute the facts regarding the

February 5, 2013 phone call but, instead, simply challenges whether those facts violate BOP rule 297. Because Plaintiff's guilt relied solely on the fact that, by being placed on speakerphone, it was impossible for BOP staff to know who or to how many people he was speaking too—and because Plaintiff has admitted those facts—the recording of the phone call is immaterial, and this claim fails. First Am. Compl., Dkt. 20, ¶ 85.

Third, Plaintiff contends that, by charging him with violating BOP rule 297, the BOP deprived him of equal protection of the law because, Plaintiff alleges, "similarly situated prisoners" were not also charged with rule violations. Id. ¶ 150. This claim fails because Plaintiff has not alleged any facts to support an alleged violation of equal protection guarantees. To allege an Equal Protection violation, Plaintiff must allege that he was intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Plaintiff has failed to state a claim for deprivation of equal protection because Plaintiff has not identified a single "similarly situated" inmate who was treated differently than he was. See Ventura Mobilehome Communities Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1055 (9th Cir.2004) (conclusory allegations of Equal Protection violation, unaccompanied by allegations identifying others similarly situated or alleging how they are treated differently from plaintiff, are insufficient to withstand motion to dismiss). Plaintiff has also failed to identify the basis on which he was allegedly treated differently. Once Plaintiff's conclusory allegations are stripped away, as they must be, there is nothing left of his alleged Equal Protection claim, and that claim should be dismissed.

Finally, Plaintiff alleges that the Court should invalidate the 2013 disciplinary action because Officer Elliott was allegedly not qualified to serve as a Discipline Hearing Officer at the time she heard his case. First Am. Compl., Dkt. 20, ¶ 90. Plaintiff bases this claim on a declaration Officer Elliott submitted in a separate litigation, Konopka v. McGrew, Case No. 2:13-cv-9370-VAP(SP), in which Plaintiff alleges that Officer Elliott "declared under oath that she was not DHO certified until October 2013."

First Am. Compl., Dkt. 20, n.27. But Plaintiff characterization of Officer Elliott's declaration is false. Officer Elliott's declaration clearly states that she has been "certified as a DHO since October 23, 2003." Biché Decl., Dkt. 22-1, Ex. 1, ¶¶ 1, 16(B); see also Request for Judicial Notice, Dkt. 22-2. Accordingly, Plaintiff's allegation that Officer Elliott was unqualified at the time she determined the Plaintiff violated BOP rule 297 is contradicted by the document referenced in his First Amended Complaint, and that allegation fails.[3]

C. Plaintiff has failed to state a claim for deprivation of due process because the 2013 disciplinary action is supported by the facts admitted in his First Amended Complaint.

Even if Plaintiff had alleged sufficient facts to establish the alleged improprieties with his 2013 disciplinary action, his Second Claim for Relief would still fail because the allegations in his First Amended Complaint demonstrate that the requirements of due process were satisfied.

In the context of prison disciplinary findings, the Supreme Court has held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board." Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 455 (1985). To determine whether an inmate received sufficient process, a reviewing court need only determine "whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." Id. at 455–56 ("The

[3] Additionally, the portion of the Report and Recommendation from Konopka that Plaintiff relies on is clearly a typographical error. In Konopka, the petitioner alleged that Officer Elliott was unqualified to preside over his February 2013 disciplinary hearing. See Konopka v. McGrew, 2015 WL 1383573, at *2 (C.D. Cal. Mar. 20, 2015) (adopting the Report and Recommendation). The Magistrate Judge's Report and Recommendation, which the District Court Judge adopted, rejected this argument based on Officer Elliott's declaration. Id. at *3 ("[P]etitioner's claim that neither DHO Elliott nor Correctional Counselor Chandlee were trained and certified is without merit."). That the Report and Recommendation states that Officer Elliott was certified in "October 2013" while simultaneously rejecting the plaintiff's argument that Officer Elliot was unqualified in February 2013, demonstrates that the October 2013 date was simply an error.

fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact."). The March 2013 finding that Plaintiff violated BOP rule 297 is supported by admissions in Plaintiff's First Amended Complaint—namely his admissions that he called Professor Stanford and was then put on speakerphone so that he could speak to a large group of people. First Am. Compl., Dkt. 20, ¶ 85. Accordingly, because the 2013 disciplinary action is supported by the undisputed facts alleged in Plaintiff's First Amended Complaint, Plaintiff cannot demonstrate that he was deprived of due process, and his Second Claim for Relief should be dismissed.

V. Conclusion

For the reasons stated above, the United States Bureau of Prisons and Warden Milusnic request that the Court grant this Motion and dismiss Plaintiff's First Amended Complaint.

Dated: September 17, 2018

Respectfully submitted,

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