UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

THERESA TORRICELLAS, **Plaintiff,** **v.** **HUGHES, et al.,** **Defendants.**	**No. EDCV 17-928 AG (AJW)** **MEMORANDUM AND ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND**

Proceedings

Plaintiff, a prisoner proceeding pro se, filed this complaint pursuant to 42 U.S.C § 1983 on May 12, 2017. For the following reasons, the complaint is dismissed without prejudice and with leave to amend.

Standard governing dismissal

Complaints such as plaintiff's are subject to the Court's sua sponte review under provisions of the Prison Litigation Reform Act of 1995 ("PLRA"), Pub.L. No. 104-134, 110 Stat. 1321 (1996). See 28 U.S.C. § 1915A(a). Pursuant to the PLRA, the court shall dismiss such a complaint, at any time, if the court finds that it (1) is frivolous or malicious, (2) fails to state a claim on which relief may be granted, or (3) seeks monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915A(b); see Lopez v. Smith, 203 F.3d 1122, 1126-1127 & n. 7 (9th Cir.2000) (en banc). In determining whether dismissal is warranted for failure to state a claim, the Court applies the standard of Federal Rule of Civil Procedure 12(b)(6): "[a]

complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

In applying the foregoing standard, the Court must construe the pleadings liberally and afford the plaintiff the benefit of any doubt. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (per curiam); see Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)(stating that "we continue to construe pro se filings liberally when evaluating them under Iqbal," and "particularly in civil rights cases, . . . to afford the [plaintiff] the benefit of any doubt") (citation omitted). In giving liberal interpretation to a pro se complaint, however, the Court may not supply essential elements of a claim that were not initially pled, Byrd v. Maricopa County Sheriff's Dep't, 629 F.3d 1135, 1140 (9th Cir.), cert. denied, 563 U.S. 1033 (2011), and the Court need not accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

Finally, where a complaint is subject to dismissal for failure to state a claim, the court must provide a pro se litigant leave to amend the complaint unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Akhtar, 698 F.3d at 1212 (internal quotation marks omitted); see Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

1. Unrelated claims

The complaint alleges numerous claims based upon separate unrelated incidents occurring at different times and involving different defendants. Plaintiff, however, may not pursue unrelated claims against different defendants in a single action. See George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) ("Unrelated claims against different defendants belong in different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit produce[s] but also to ensure that prisoners pay the required filing fees – for the Prison Litigation Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file without prepayment of the required fees.") (citing Fed. R. Civ. P. 18(a)) & 28 U.S.C. § 1915(g)); Young v. Biter, 2015 WL 3604158, at *4-5 (E.D. Cal. June 8, 2015) (stating that

plaintiff could not prosecute disparate claims against multiple defendants for different incidents at different times in a single action).

2**. Retaliation**

The complaint alleges that, on January 11, 2016, defendant correctional counselor Ferguson instructed plaintiff and other "lifer" prisoners to complete the COMPAS assessment test.[1] [Complaint at 8]. Ferguson told plaintiff that the test was mandatory pursuant to California prison regulations, but did not show plaintiff the copy of the memorandum purportedly saying so. Plaintiff refused to complete the test. She alleges that her refusal to take the test was an "exercise of her right of privacy and to free speech." [Complaint at 10]. As a result of her refusal, plaintiff received a rules violation report charging her with disobeying an order and refusing to take the test. [Complaint at 9]. Plaintiff alleges defendants Ferguson, Mercado, Hughes, Tidwell, and Stainer deprived plaintiff of her First Amendment rights by retaliating against her based upon her refusal to participate in the test. [Complaint at 8]. This retaliation includes charging plaintiff with a rules violation, finding her guilty of the rules violation, and periodic "harassment" and "badgering" by staff who are "attempting to induce her into taking the COMPAS despite their knowledge of plaintiff's previous refusal...." [Complaint at 11].

In order to state a viable claim of retaliation, plaintiff must allege: (1) a state actor took adverse action against her; (2) the adverse action was substantially motivated by plaintiff's protected conduct; (3) the adverse action chilled plaintiff's exercise of her First Amendment rights; and (4) the adverse action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559, 567-568 (9th Cir. 2005).

Because plaintiff has no Constitutional right – under the First Amendment or otherwise – to refuse to complete a risk assessment evaluation, she cannot state a retaliation claim based on her refusal to do so. Johnson v. Fox, 2017 WL 823407, at *3 (E.D. Cal. Mar. 2, 2017) (dismissing a retaliation claim because the prisoner plaintiff did not have a constitutional right to refuse to take the COMPAS test, so charging the plaintiff with a rules violation did not amount to retaliation for a protected activity); Williams v. Castaneda,

[1] The COMPAS test is used to weigh a variety of factors and to predict an individual's risk of future violence. See Beth Caldwell, Creating Meaningful Opportunities for Release: Graham, Miller and California's Youth Offender Parole Hearings, 40 N.Y.U. Rev. L. & Soc. Change 245, 279 (2016).

2016 WL 4120326, at *2 (E.D. Cal. Aug. 1, 2016) ("Plaintiff's First Amendment retaliation claim fails because the conduct that he describes – namely, the exercise of his statutory right to decline participation in certain programs at CSH – does not amount to protected conduct under the First Amendment."), reconsideration denied, 2016 WL 5403853 (E.D. Cal. Sept. 27, 2016); see also Molesky v. Walter, 931 F. Supp. 1506, 1510-1511 (E.D. Wash. 1996) (holding that a prisoner has no protected liberty interest in avoiding a psychological examination), aff'd, 129 F.3d 126 (9th Cir. 1997); Eze v. Higgins, 1996 WL 861935, at *6 (W.D.N.Y. Mar. 20, 1996) (same). Further, the adverse action about which plaintiff complains has a legitimate correctional goal. Molesky, 931 F. Supp. At 1511 ("Mental health evaluations are clearly a legitimate penological tool for assessing whether an inmate constitutes too great a risk for placement in the much less restrictive environment of minimum custody, including the progressively less restrictive environments of camp, work release and pre-release. Classification of inmates is a necessary process for the effective management of correctional institutions. Mental health evaluations assist in that process. As such, any inmate could reasonably expect to undergo a mental health evaluation as part of the conditions of his confinement.").

The alleged retaliation in the form of "harassment" by defendants who continue to attempt to induce plaintiff to complete the COMPAS assessment is not sufficiently significant to be actionable. See Johnson, 2017 WL 823407, at *3 (stating that the inmate plaintiff's allegations of being forced to take the COMPAS test, and being written up for refusing to do so, did "not rise to the level of a constitutional violation for harassment"); see generally Ransom v. Aguirre, 2013 WL 398903, at *4 (E.D. Cal. Jan.31, 2013) ("insignificant" or "de minimis" retaliatory acts are not actionable).

Finally, to the extent plaintiff alleges that defendants retaliated against her by denying or mishandling her grievances, she cannot state a claim for relief. The denial of a grievance "neither constitutes an adverse action that is more than de minimis nor is it sufficient to deter a prisoner of 'ordinary firmness' from further First Amendment activities." Dicey v. Hanks, 2015 WL 4879627, at *5 (E.D. Cal. Aug. 14, 2015), report and recommendation adopted, 2015 WL 6163444 (E.D. Cal. Oct. 15, 2015); see Martin v. Woodford, 2009 WL 30300, at *6 (E.D. Cal. Jan. 6, 2009) ("Merely by [sic] ruling against Plaintiff in a grievance procedure is not sufficient to allege an adverse action."); report and recommendation adopted, 2009 WL 529601 (E.D. Cal. Feb. 27, 2009).

3. Disciplinary hearing

The complaint alleges that plaintiff was denied due process in a disciplinary hearing. Specifically, plaintiff complains that defendant correctional lieutenant Mercado, who conducted the disciplinary hearing, was biased, was predisposed to find her guilty, and allowed defendant Ferguson to refer to documents during the hearing. The complaint also alleges that defendant Mercado's guilty finding "rests on no evidence" because she was not lawfully required to take the COMPAS test so she could not be disciplined for failing to do so. [Complaint at 10-11]. As a result of the disciplinary finding, plaintiff was assessed a 30-day loss of credits. [Complaint at 11]. The complaint also alleges that the disciplinary violation will likely add ten years to her prison sentence. [Complaint at 11].

The procedural guarantees of the Fifth and Fourteenth Amendments' Due Process Clauses apply only when a constitutionally protected liberty or property interest is at stake. See Ingraham v. Wright, 430 U.S. 651, 672-73 (1977); Jackson v. Carey, 353 F.3d 750, 755 (9th Cir. 2003). To state a plausible procedural due process claim, plaintiff must allege that (1) she was deprived of a protected liberty or property interest, and (2) the procedures followed by the state in depriving her of that interest were constitutionally insufficient. See Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam). Protected liberty interests may arise from either the Due Process Clause itself or from state law. See Wilkinson v. Austin, 545 U.S. 209, 221 (2005); Sandin v. Conner, 515 U.S. 472, 483-484 (1995). In Sandin, the Supreme Court made clear that due process protects only liberty interests of "real substance," which are limited to freedom from restraint that either: (1) "will inevitably affect the duration of [the inmate's] sentence"; or (2) imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 484, 487.

The complaint alleges that plaintiff was assessed a 30-day credit loss. Generally, plaintiff does have a protected liberty interest in the length of her incarceration. Here, however, the loss of credits will not "inevitably affect the duration of [her] sentence." See Sult v. Paramo, 2016 WL 1166363, at *11 (S.D. Cal. Jan. 26, 2016) (holding that a prisoner did not have protected liberty interest in sentence credits because he was serving a life sentence, so loss of credits did not have an "inevitable affect" on the duration of his confinement), report and recommendation adopted, 2016 WL 1162670 (S.D. Cal. Mar. 24, 2016); Stuart v. Singh, 2011 WL 2746096, at *8 (E.D. Cal. July 14, 2011) ("the credits that Petitioner is statutorily

entitled to earn as a life prisoner have no direct impact on the amount of time he must actually serve until the Board determines he is suitable for parole and assigns him a parole release date") (quoting Bowens v. Sisto, 2011 WL 2198322, at *13 (E.D. Cal. June 6, 2011)) . Furthermore, any negative effect the inclusion of the disciplinary finding in plaintiff's file may have on her consideration for parole is too speculative to "inevitably affect the duration of [her] sentence." Sandin, 515 U.S. at 487(explaining that a disciplinary decision in a prisoner's file is only one of a "myriad of considerations" taken by the Board of Parole Hearings, and that "[t]he chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause").

Plaintiff has no protected liberty interest in avoiding a psychological evaluation. See Molesky v. Walter, 931 F. Supp. 1506, 1511 (E.D. Wash. 1996) (holding that a prisoner has no protected liberty interest in avoiding a psychological examination), aff'd, 129 F.3d 126 (9th Cir. 1997); Eze v. Higgins, 1996 WL 861935, at *6 (W.D.N.Y. Mar. 20, 1996) (same).

The complaint also fails to allege that plaintiff suffered any "atypical and significant hardship" as a result of disciplinary hearing. Sandin, 515 U.S. at 484; see Ramirez v. Galaza, 334 F.3d 850, 860-861 (9th Cir. 2003), cert. denied, 541 U.S. 1063 (2004). A plaintiff must assert a "dramatic departure" from the standard conditions of confinement before due process concerns are implicated. Sandin, 515 U.S. at 485-486. The complaint fails to do so.

Finally, to the extent plaintiff's due process claim is based upon an alleged failure to properly handle her inmate grievances , it fails as a matter of law. See Ramirez, 334 F.3d at 860 (holding that the district court correctly found that "because inmates have no constitutional right to a prison grievance system, the actions of the prison officials in reviewing his internal appeal cannot create liability under § 1983") (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)); see also Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir.2011) ("[T]he alleged mishandling of [a prisoner's] grievance by persons who otherwise did not cause or participate in the underlying conduct states no claim."); Hoak v. Siegert, 2016 WL 1259383, at *3 (D. Idaho Mar. 30, 2016) (explaining that the alleged refusal to properly process plaintiff's grievances does not amount to a due process violation and that "allegations that the jail's grievance process was either denied or failed to function properly are not cognizable under Section 1983 because no protected liberty interest is implicated").

4. Parole

The complaint includes numerous allegations related to the 2016 decision denying her parole. None of these allegations state a claim for relief.

a. Due Process

The complaint alleges that the California Board of Parole Hearings ("Board"), defendants Chappell and Lam (the Commissioners who presided over plaintiff's parole hearing), and defendant Shaffer (the Executive Director of the Board), deprived plaintiff of due process at her December 28, 2016 parole hearing. [Complaint at 12]. Specifically, plaintiff alleges that although she received several postponements of her hearing date, she was denied additional postponements which she needed in order to secure removal of improper confidential materials in her prison file and to have "responsive materials placed in the prison file" prior to the hearing. [Complaint at 12-13]. Plaintiff brought to the parole hearing the documents she believed to be relevant – including 21 documents plus documents listed in a 16 page document. [Complaint at 13]. Defendants, however, refused to allow plaintiff to present and discuss the documents. [Complaint at 13]. Further, according to the complaint:

> Despite defendant Chappell and Lam's intentionally ambiguous or misleading responses, their message was sufficiently clear for plaintiff to get the message that they were unwilling to deviate from the unconstitutional hearing format so that plaintiff could receive due process and constitutional/statutory hearing rights so as to obtain a meaningful "opportunity to be heard." Consequently, plaintiff terminated her participation in the parole hearing at the earliest time thereafter to avoid further waste of time or having to suffer further abuse and insult to the indignity of the incompetent, farcical parole hearing process applied by the parole board.

[Complaint at 14]. Plaintiff also alleges that in the past she had been limited to three to five minutes to make her closing argument in favor of parole suitability and she had been rudely interrupted by the commissioners, so she "has not since endeavored to make a closing statement." [Complaint at 14].

Based upon the foregoing, plaintiff alleges that she was denied an opportunity to be heard, to present relevant documentary evidence, and to contest "false" evidence. [Complaint at 12-16].

Plaintiff concedes that she was present at the parole hearing and was permitted to speak on her own behalf. [See Complaint at 13-14]. Plaintiff's complaint essentially amounts to a claim that she is entitled to present any and all evidence that she believes relevant and reliable while excluding any and all evidence she believes to be unreliable. However, the minimal protections of due process do not encompass such a right. To the contrary, as the Supreme Court has made clear, the Constitution requires nothing more than an opportunity to be heard and a statement of the reasons why parole was denied. See Swarthout v. Cooke, 562 U.S. 216, 220 (2011); see also Hardney v. Virga, 2014 WL 3956684, at *8 (E.D. Cal. Aug. 8, 2014) (holding that under Swarthout, the inmate could not state a due process claim based upon allegations that the Board relied on unreliable and invalid evidence and prevented him from presenting reliable favorable documents), report and recommendation adopted, 2014 WL 5473115 (E.D. Cal. Oct. 22, 2014); see generally, Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.").[2]

b. Ex Post Facto Clause

The complaint alleges that application of Marsy's Law[3] to deny plaintiff parole for a period of five years violated the Ex Post Facto Clause. [Complaint at 17-18].

The Ninth Circuit has held that Marsy's Law does not violate the Ex Post Facto Clause. Gilman v. Brown, 814 F.3d 1007 (9th Cir. 2016), cert. denied, 137 S. Ct. 650 (2017) . Accordingly, plaintiff cannot proceed on the basis of this claim.

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[2] The Court takes judicial notice that plaintiff made a similar claim in her petition for a writ of habeas corpus challenging the Board's previous denial of parole. Torricellas v. Garcia, 2011 WL 1979398, at *1 (C.D. Cal. Mar. 14, 2011), report and recommendation adopted, 2011 WL 1936059 (C.D. Cal. May 19, 2011). Specifically, she alleged that the Board denied her procedural due process because it refused to consider documentary evidence she submitted, including documents "related to the offense, mitigating circumstances, and otherwise impeaching false and unreliable or inaccurate material available to the Board in the record before it, and without even providing a cursory examination of the information, documents, and affidavits presented the panel, all of which went to the central issue of the gravity of the offense, petitioner's individual culpability, and therefore the primary critical consideration in assessing petitioner's current risk of dangerousness if released on parole." Torricellas, 2011 WL 1979398, at *1. After examining the documents presented by plaintiff and the transcript of the hearing, the Court rejected her claim, noting that notwithstanding any alleged failure of the Board to look at each of plaintiff's documents, plaintiff was provided a meaningful opportunity to be heard. Torricellas, 2011 WL 1979398, at *2.

[3] See Cal. Penal Code § 3041.5(b).

c. Right to an "Adequate" Psychological Evaluation

The complaint alleges that plaintiff was denied her due process right to an unbiased psychological evaluation in connection with her parole hearing. According to the complaint, the psychological evaluations relied upon by the Board are "inappropriate" and designed to "manufacture false adverse risk assessments" in order to inflate findings of unsuitability. In addition, the complaint alleges that the psychologists employed by the Board are professionally incompetent. [Complaint at 20- 22].

In a separate but related claim for relief, the complaint alleges that plaintiff was deprived of her Fourteenth and First Amendment rights by "professionally incompetent, maliciously adverse parole board psychological evaluation with false diagnostic conclusions and a fraudulently elevated risk of future violence assessment in retaliation for plaintiff's exercise of her legal rights and right of free speech." [Complaint at 23]. In addition, defendant psychologist Larmer provided a "false" psychological evaluation in 2015 and defendant Kusaj (the Board's chief psychologist) and Shaffer refused to remove that evaluation from plaintiff's prison file. [Complaint at 24-25]

As discussed above, the Constitution provides minimal procedural protections in a parole hearing. There is no right to have a particular expert appointed or to have other expert opinions excluded. Accordingly, plaintiff's allegations fail to state a claim. See Hall v. Tehrani, 2010 WL 3931099, at *1 (N.D. Cal. Oct. 5, 2010) (dismissing a civil rights claim based upon the allegation that the defendant provided a false psychological evaluation that the Board relied upon in denying parole, stating "plaintiff has not stated, and the court is unaware of, any federal or constitutional violation regarding the creation of an alleged false psychological evaluation"), reconsideration denied, 2011 WL 289419 (N.D. Cal. Jan. 27, 2011).

d. Retention of Transcript

The complaint alleges that the Board denied plaintiff due process and her right to freedom of speech by retaining a copy of the transcript of her 2014 parole hearing because that parole decision was vacated. [Complaint at 26-28]. As discussed above, due process does not require that certain evidence be excluded from consideration. There is no constitutional right to have transcripts excluded from an inmate's file or from consideration by a parole board. Finally, notwithstanding plaintiff's reference to "freedom of speech," she fails to allege any facts suggesting how the retention of a transcript affected her rights.

Based upon the foregoing defects, plaintiff has three options:

(1) Plaintiff **may continue this action in this court** by filing a document labeled **"First Amended Complaint" ("FAC")** bearing case number EDCV17-928-AG (AJW) within **twenty-one (21) days** of the date of this order. To withstand dismissal, the amended complaint must attempt to correct the deficiencies described above.

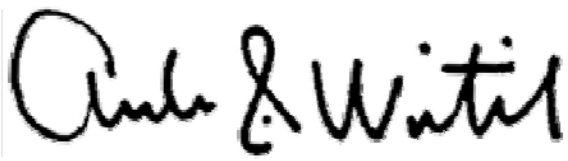
(2) Plaintiff **may file a "Notice of Intent Not to Amend Complaint"** within **twenty-one (21) days** of the date of this order. The timely filing of a notice of intent not to amend will be construed as an indication that plaintiff wishes to challenge the dismissal of his or her complaint by seeking appellate review of this order in the Ninth Circuit Court of Appeals. If plaintiff timely notifies the court in writing of his or her intent not to file an amended complaint, this action will be dismissed with prejudice for failure to comply with Rule 8(a), and plaintiff will be free to appeal the dismissal of his complaint on that ground. Cf. Edwards v. Marin Park, Inc., 356 F.3d 1058, 1063-1066 (9th Cir. 2004); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995).

(3) Plaintiff **may do nothing in response to this order**. If plaintiff does not respond to this order by filing either a timely amended complaint or a notice of intent not to amend, plaintiff will be deemed to have consented to the dismissal of this action with prejudice under Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute and failure to comply with this court's order. See Edwards, 356 F.3d at 1063-1066.

Plaintiff is cautioned that failure to respond within the time permitted by this order may result in the dismissal of this action with prejudice.

IT IS SO ORDERED.

Dated: July 24, 2017



ANDREW J. WISTRICH
United States Magistrate Judge