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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ALAN CASSINI,

Plaintiff,

v.

HARLEY LAPPIN, et al.,

Defendants.

CASE NO. 1:08-cv-00644-OWW-SMS-PC

ORDER DISMISSING COMPLAINT, WITH
LEAVE TO FILE AMENDED COMPLAINT
WITHIN THIRTY DAYS

(Doc. 1)

RESPONSE DUE WITHIN THIRTY DAYS

I. Screening Requirement

Plaintiff Michael Cassini (“Plaintiff”) is a federal prisoner proceeding pro se and in forma pauperis in this civil action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which provides a remedy for violation of civil rights by federal actors. Plaintiff filed this action on May 8, 2008.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions,” none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a short and

1 plain statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P. 8(a).
2 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and the
3 grounds upon which it rests.” Swierkiewicz, 534 U.S. at 512. However, “the liberal pleading
4 standard . . . applies only to a plaintiff’s factual allegations.” Neitze v. Williams, 490 U.S. 319, 330
5 n.9 (1989). “[A] liberal interpretation of a civil rights complaint may not supply essential elements
6 of the claim that were not initially pled.” Bruns v. Nat’l Credit Union Admin., 122 F.3d 1251, 1257
7 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

8 **II. Plaintiff’s Claims**

9 **A. Summary of the Complaint**

10 Plaintiff is a federal prisoner currently housed at the Federal Correctional Institution in
11 Terminal Island, California. The events giving rise to the complaint occurred while Plaintiff was
12 incarcerated at Taft Correctional Institution (TCI) in Taft, California. TCI is a federal correctional
13 facility operated by the GEO Group, Inc., pursuant to a contract between GEO and the Federal
14 Bureau of Prisons (BOP). Plaintiff raises a Fifth Amendment equal protection challenge to a joint
15 TCI-BOP policy that limits the number of administrative appeals a prisoner at TCI may file after
16 receiving a disciplinary infraction.

17 The Code of Federal Regulations sets forth disciplinary procedures for federal prisoners
18 under the care and control of the BOP. See 28 C.F.R. § 541 (2008).¹ Each federal correctional
19 facility must establish a Unit Discipline Committee (UDC), comprised of “one or more institution
20 staff members delegated by the Warden the authority and duty to hold an initial hearing upon
21 completion of the investigation concerning alleged charge(s) of inmate misconduct.” 28 C.F.R. §
22 541.2 (2008). The UDC may impose minor dispositions and sanctions.²

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25 ¹ As the events giving rise to the complaint occurred in 2007, the 2007 version of the Code of Federal Regulations
26 governed Plaintiff’s administrative remedies at the time. The relevant sections of the 2007 Code were republished
without change in the 2008 edition of the Federal Code of Regulations.

27 ²When an alleged offense is serious and warrants consideration for other than minor sanctions, the UDC must refer
28 the charges to a Discipline Hearing Officer (DHO). 28 C.F.R. § 541.15 (2008). The DHO then “conduct[s] hearings,
make[s] findings, and impose[s] appropriate sanctions for incidents of inmate misconduct referred for disposition
following the hearing required by §541.15 before the UDC.” 28 C.F.R. § 541.16 (2008).

1 The Code establishes three levels of administrative review of disciplinary action taken against
2 federal prisoners. 28 C.F.R. §§ 542.10-542.15 (2008). Each institution’s warden, the BOP Regional
3 Director, and the BOP General Counsel are responsible for the implementation and operation of the
4 Administrative Remedy Program at the institutional, regional, and Central Office levels, respectively.
5 28 C.F.R. § 542.11(a) (2008). The first level of administrative review, referred to as BP-9, allows
6 prisoners to appeal UDC decisions to the warden of the institution.³ 28 C.F.R. § 542.14 (2008). A
7 prisoner who is not satisfied with the warden's response may submit a second appeal, referred to as
8 a BP–10, to the appropriate BOP Regional Director for the region in which the correctional facility
9 is located. 28 C.F.R. § 542.15(a) (2008). Finally, an inmate who is not satisfied with the Regional
10 Director's response may submit a BP-11 appeal to the BOP’s General Counsel. Id.

11 According to the complaint, Plaintiff was improperly found guilty of a UDC infraction while
12 he was incarcerated at TCI. Plaintiff appealed the infraction, and the Warden denied Plaintiff’s
13 appeal at the BP-9 level.⁴ Plaintiff then attempted to file a BP-10 appeal with the appropriate
14 Regional Director for TCI, the Privatization Management Branch (PMB). PMB rejected Plaintiff’s
15 BP-10 appeal on October 27, 2006, stating: “UDC action is not appealable to the BOP. You must
16 use the grievance procedures at your facility.” Complaint, p.8: 27-28. The complaint states that,
17 pursuant to a joint GEO and BOP policy, inmates housed at TCI are denied BP-10 and BP-11 level
18 administrative review. Plaintiff alleges that due to procedural and evidentiary deficiencies at his
19 initial UDC hearing, access to BP-10 and BP-11 review would have resulted in the dismissal of his
20 UDC infraction, and that the UDC infraction has adversely affected his custody status and caused
21 him to lose institutional privileges. Plaintiff claims that he is similarly situated with other prisoners
22 under the control of the BOP and that there is no rational basis for denying him access to the BP-10
23 and BP-11 administrative remedies that are afforded to other federal prisoners.

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26 ³ DHO decisions must be appealed directly to the Regional Director for the region where the inmate is located. 28
27 C.F.R. § 542.14(d)(2). Plaintiff challenges only the administrative procedure provided to him with respect to UDC
28 decisions.

⁴ The complaint states that two BP-9's were filed, the first of which the Warden granted with instructions to the UDC
to re-write the incident report.

1 The complaint names Defendants in both their individual and official capacities. To the
2 extent Plaintiff seeks to sue Defendants in their official capacities for monetary damages, such
3 claims are not cognizable. “[N]o Bivens-like cause of action is available against federal agencies or
4 federal agents sued in their official capacities.” Ibrahim v. Dep’t of Homeland Sec., 538 F.3d 1250,
5 1257 (9th Cir. 2008) (citing FDIC v. Meyer, 510 U.S. 471, 485-86 (1994); Nurse v. United States,
6 226 F.3d 996, 1004 (9th Cir. 2000)).

7 **B. Equal Protection Claim**

8 “[T]he Due Process Clause of the Fifth Amendment subjects the federal government to
9 constitutional limitations that are the equivalent of those imposed on the states by the Equal
10 Protection Clause of the Fourteenth Amendment.”⁵ Consejo De Desarrollo Economico De Mexicali,
11 A. C. v. United States, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007) (citing Bolling v. Sharpe, 347 U.S.
12 497 (1954)). The approach to Fifth Amendment discrimination claims is “precisely the same as the
13 approach to equal protection claims under the Fourteenth Amendment.” Weinberger v. Wiesenfeld,
14 420 U.S. 636, 637 (1975); but see Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (“there may
15 be overriding national interests which justify selective federal legislation that would be unacceptable
16 for an individual State”). Where a government policy does not impinge on a fundamental right or
17 disadvantage a protected suspect class, equal protection requires only that the policy “be shown to
18 bear some rational relationship to legitimate state purposes.” E.g. San Antonio Indep. Dist. v.
19 Rodriguez, 411 U.S. 1, 40 (1973). A plaintiff may establish an equal protection claim by showing
20 1) the plaintiff is a member of an identifiable class; 2) the plaintiff was intentionally treated
21 differently from others similarly situated; and 3) there is no rational basis for the difference in
22 treatment. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

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26 ⁵ Plaintiff’s claims do not state a due process claim outside the equal protection context, as prisoners have no due
27 process right to a specific grievance procedure. See, e.g., Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no
28 liberty interest in processing of appeals because no entitlement to a specific grievance procedure). However, where
the government has made a “substantial review proceeding generally available on [an] issue, the [government] may
not, consistent with [equal protection], arbitrarily withhold it from some,” Baxstrom v. Herold, 383 U.S. 107, 111
(1966) (discussing Fourteenth Amendment limitations on State action with respect to civil commitment hearings).

1 The complaint fails to state what each Defendant did that led to the deprivation of Plaintiff's
2 constitutional rights. The complaint does not allege that BOP Defendants are responsible for the
3 formulation or enforcement of the policy denying Plaintiff access to BP-10 and BP-11 appeals.⁶
4 Even assuming that the BOP's policy denies Plaintiff equal protection, Plaintiff fails to allege that
5 TCI Defendants applied the BOP's policy to Plaintiff in a discriminatory manner. Accordingly,
6 Plaintiff's allegations are insufficient to state any claims against Defendants.

7 **C. Request for Injunctive Relief**

8 Plaintiff asks the Court to grant preliminary injunctive relief in the form of an order directing
9 TCI and BOP to transfer Plaintiff back to a minimum security camp within the BOP. It also appears
10 Plaintiff requests a permanent injunction directing the BOP and TCI to expunge the incident report
11 from Plaintiff's file.

12 Federal courts are courts of limited jurisdiction, and as a preliminary matter, the Court must
13 have before it an actual case or controversy in order to act. E.g. City of Los Angeles v. Lyons, 461
14 U.S. 95, 102 (1983). If the court does not have an actual case or controversy before it, it has no
15 power to hear the matter in question. Id. Under the Prison Litigation Reform Act (PLRA), the Court
16 must find that the prospective relief is "narrowly drawn, extends no further than necessary to correct
17 the violation of the Federal right, and is the least intrusive means necessary to correct the violation
18 of the federal right." 18 U.S.C. § 3626(a)(1)(2008).

19 The basis of Plaintiff's complaint is that the unavailability of BP-10 and BP-11
20 administrative review at TCI denies Plaintiff equal protection. Neither expunging Plaintiff's record
21 nor transferring Plaintiff back to a minimum security facility would correct the denial of BP-10 and
22 BP-11 administrative review to Plaintiff. The injunctive relief sought by Plaintiff is not narrowly
23 draw and does not correct the alleged equal protection violation. Accordingly, Plaintiff is not
24 entitled to the injunctive relief requested in the complaint.

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27 ⁶Although the complaint states that Defendant Wrigley, TCI's Warden, denied Plaintiff's BP-9 appeal, it does not
28 allege that Wrigley prevented the Plaintiff from submitting a BP-10 or BP-11 appeal. Plaintiff's allegation that
Wrigley denied Plaintiff's BP-9 appeal, without more, does not allege a violation of any constitutional right.

1 **III. Conclusion and Order**

2 Plaintiff's complaint fails to state a claim against Defendants for violation of Plaintiff's
3 constitutional rights. The Court will provide Plaintiff with the opportunity to file an amended
4 complaint curing the deficiencies identified by the Court in this order. Noll v. Carlson, 809 F.2d
5 1446, 1448-49 (9th Cir. 1987).

6 If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P. 8(a), but
7 must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or
8 other federal rights, Hydrick v. Hunter, 500 F.3d 978, 987-88 (2007). Although accepted as true,
9 the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level .
10 . . ." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (citations omitted). Plaintiff
11 may not change the nature of this suit by adding new, unrelated claims in his amended complaint.
12 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints). Finally, Plaintiff
13 is advised that an amended complaint supercedes the original complaint, Forsyth v. Humana, Inc.,
14 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must
15 be "complete in itself without reference to the prior or superceded pleading," E.D. Cal. R. 15-220.
16 Plaintiff is warned that "[a]ll causes of action alleged in an original complaint which are not alleged
17 in an amended complaint are waived." King, 814 F.2d at 567 (citing London v. Coopers & Lybrand,
18 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

19 Based on the foregoing, it is HEREBY ORDERED that:

- 20 1. The Clerk's Office shall send Plaintiff a civil rights complaint form;
- 21 2. Plaintiff's complaint is dismissed, with leave to file an amended complaint within
22 **thirty (30) days** from the date of service of this order; and
- 23 3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to
24 state a claim upon which relief may be granted.

25
26 IT IS SO ORDERED.

27 **Dated: January 29, 2009**

28 /s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE