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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF CALIFORNIA  
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7 AVINASH KARISEM,  
8 Plaintiff,

9 vs.

10 U.S. BUREAU OF PRISONS, et al.,  
11 Defendants

Case No. 1:14 cv 00312 LJO GSA PC

FINDING AND RECOMMENDATION  
THAT THIS ACTION BE DISMISSED FOR  
FAILURE TO STATE A CLAIM UPON  
WHICH RELIEF MAY BE GRANTED

12 OBJECTIONS DUE IN THIRTY DAYS  
13

14 **I. Screening Requirement**

15 Plaintiff is a federal prisoner proceeding pro se and in forma pauperis in this civil rights  
16 action pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The matter  
17 was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local  
18 Rule 302.

19 The Court is required to screen complaints brought by prisoners seeking relief against a  
20 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
21 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
22 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
23 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
24 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
25 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
26 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §  
27 1915(e)(2)(B)(ii).  
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1            Bivens actions and actions under 42 U.S.C. § 1983 are “identical save for the  
2 replacement of a state actor under § 1983 by a federal actor under Bivens. Van Strum v. Lawn,  
3 940 F.2d 406, 409 (9<sup>th</sup> Cir. 1991). Under Bivens, a plaintiff may sue a federal officer in his or  
4 her individual capacity for damages for violating the plaintiff’s constitutional rights. See Bivens,  
5 403 U.S. at 397. To state a claim a plaintiff must allege: (1) that a right secured by the  
6 Constitution of the United States was violated, and (2) that the alleged violation was committed  
7 by a federal actor.

8            **II. Plaintiff’s Claims**

9            Plaintiff, an inmate housed at the Federal Correctional Institution at Taft, California,  
10 brings this civil rights action against officials employed at Taft. Plaintiff names as defendants  
11 the United States of America, the U.S. Bureau of Prisons, Management and Training Corporation  
12 (MTC), Michael Benov and Dale Patrick.<sup>1</sup>

13            The facility where Plaintiff is housed, FCI Taft, is a privately operated prison under  
14 contract with the U.S. Bureau of Prisons. Taft is operated by Defendant MTC. Defendant  
15 Benov was the acting Warden at the time of the events at issue. Defendant Patrick was the  
16 acting Administrative Remedies Coordinator.

17            Plaintiff’s sole claim in this action is that he is subject to unconstitutional disciplinary  
18 procedures. Specifically, Plaintiff alleges that, because Taft is operated by Defendant MTC, and  
19 the disciplinary process is conducted by MTC staff, Plaintiff is subjected to the potential of  
20 having the length of his incarceration extended by the conduct of a non-government official.

21            Plaintiff has not alleged any facts that he has suffered any injury. The Prison Litigation  
22 Reform Act provides that “[n]o Federal civil action may be brought by a prisoner confined in a  
23 jail, prison, or other correctional facility, for mental and emotional injury suffered while in

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26            <sup>1</sup> Plaintiff sets forth numerous causes of action – the Federal Tort Claims Act, Alien Tort Claims  
27 Act, and various U.S. Constitutional provisions. Because the complaint squarely challenges the validity of the  
28 disciplinary procedure on constitutional grounds, the Court will construe this as an action pursuant to Bivens v. Six  
Unknown Named Agents, 403 U.S. 388 (1971).

1 custody without a prior showing of physical injury.” 42 U.S.C. § e(e). The physical injury  
2 “need not be significant but must be more than *de minimis*.” Oliver v. Keller, 289 F.3d 623, 627  
3 (9<sup>th</sup> Cir. 2002).

4 Further, assuming Plaintiff could somehow amend the complaint to allege injury, his  
5 claim fails. Federal regulations do not exclude the delegation of authority to discipline to  
6 contractor employees. The regulations apply to “all persons committed to the care, custody and  
7 control (direct or constructive) of the Bureau of Prisons.” 28 C.F.R. §541.10(a). Only  
8 “institution staff” may take disciplinary action within Bureau rules and institution guidelines. 28  
9 C.F.R. §541.10(b)(1),(2). However, regulations require the warden to delegate to institution staff  
10 members the authority to hold the initial hearing. 28 C.F.R. §541.15.

11 The pertinent statutory framework is also consistent with the delegation of authority to  
12 institution staff. Title 18 U.S.C. § 4001(b)(2) provides that the Attorney General may establish  
13 and conduct industries, farms, and other activities, classify the inmates, and provide for their  
14 proper government, discipline, treatment, care, rehabilitation and reformation. § 4041 provides  
15 that the Attorney General may appoint not only a director who is in charge of the BOP and who  
16 serves directly under the Attorney General, but also such additional officers and employees as  
17 the Attorney General deems necessary. § 4042(a)(3) provides that the BOP shall provide for  
18 the discipline of all persons of offenses against the United States. From these broad statutory  
19 grants of authority to the Attorney General, it is clear that the Attorney General has been given  
20 by Congress the authority to appoint a director of the BOP and to delegate authority to discipline  
21 inmates to additional officers and employees.

22 Finally, when a prisoner challenges the legality or duration of his custody, or raises a  
23 constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a  
24 writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973); Young v. Kenny, 907 F.2d  
25 874 (9<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1126 (1991). Where the complaint states a habeas  
26 claim instead of a § 1983 claim, the court should dismiss the claim without prejudice for failure  
27 to exhaust, rather than converting it to a habeas action and addressing it on the merits. See

1 Blueford v. Prunty, 108 F.3d 251, 255 (9<sup>th</sup> Cir. 1997); Trimble v. City of Santa Rosa, 49 F.3d  
2 583, 586 (9<sup>th</sup> Cir. 1995). Plaintiff specifically alleges that any disciplinary process that he may  
3 be subjected to would increase the length of his confinement. Therefore any such claim should  
4 be brought as a habeas petition.

5 **III. Conclusion and Recommendation**

6 Plaintiff's complaint does not state any cognizable claims under section 1983. Plaintiff's  
7 claim arises from his allegation that prison staff does not have the authority to discipline him.  
8 Plaintiff has not been subjected to discipline, prison staff has the statutory authority to discipline  
9 inmates, and any claim that affects the length of Plaintiff's sentence should be brought as a  
10 habeas petition. Because the Court finds that these deficiencies are not capable of being cured  
11 by amendment, the Court HEREBY RECOMMENDS dismissal of this action, with prejudice,  
12 for failure to state a claim. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

13 These Findings and Recommendations will be submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
15 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file  
16 written objections with the Court. The document should be captioned "Objections to Magistrate  
17 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections  
18 within the specified time may waive the right to appeal the District Court's order. Martinez v.  
19 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 IT IS SO ORDERED.

22 Dated: November 12, 2014

23 /s/ Gary S. Austin

24 UNITED STATES MAGISTRATE JUDGE

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