United States District Court,
D. Colorado.
Nidal A. AYYAD, Plaintiff,
v.
Alberto GONZALES, U.S. Attorney General, et al., Defendants.
Civil Action No. 05–cv–02342–WYD–MJW.
Jan. 30, 2007.

Robert Jacob Barron, Law Office of Robert J. Barron, Colorado Springs, CO, for Plaintiff.

William George Pharo, U.S. Attorney's Office, Denver, CO, for Defendants.

Nidal Ayyad, Florence, CO, pro se.

ORDER AFFIRMING AND ADOPTING RECOMMENDATIONS OF MAGISTRATE JUDGE

WILEY Y. DANIEL, U.S. District Judge.

***1** This matter is before the Court on Defendants Federal Bureau of Prisons, Harley G. Lappin, Alberto Gonzalez, R. Wiley, Michael K. Nalley, and Harrel Watts's Motion to Dismiss for Failure to Exhaust Administrative Remedies [# 52], filed on July 12, 2006, and Defendants' Motion to Dismiss Official Capacity Claims for Damages [# 53], filed on July 12, 2006. The matter was referred to Magistrate Judge Watanabe for a recommendation by memorandum dated July 13, 2006. Magistrate Judge Watanabe issued a Recommendation on September 29, 2006, which is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1), FED.R.CIV.P. 72(b), D.C.COLO.LCivR. 72.1. Magistrate Judge Watanabe recommends therein that "the Defendants' Motion to Dismiss for Failure to Exhaust ... be denied." Recommendation at 8. Magistrate Judge Watanabe further recommends that "Defendants' [unopposed] Motion to Dismiss Official Capacity Claims for Damages be granted." *Id.*

On October 16, 2006, Defendants filed a timely Partial Objection to Magistrate Judge Watanabe's Recommendation, which necessitates a *de novo* determination as to those specified proposed findings or recommendations to which objection is made since the nature of the matter is dispositive. FED.R.CIV.P. 72(b); 28 U.S.C. § 636(b)(1).

Magistrate Judge Watanabe recommends that Defendants' Motion to Dismiss Official Capacity Claims for Damages be granted as Plaintiff has confessed the motion. Recommendation at 3. I also find that Plaintiff, in his Response [# 69] has confessed Defendants Motion to Dismiss Official Capacity Claims [# 53]. Accordingly, Defendants' Motion to Dismiss Official Capacity Claims is granted and the Official Capacity claims are dismissed with prejudice.

As to Defendants' Motion to Dismiss for Failure to Exhaust [# 52], Magistrate Judge Watanabe first finds that it is properly analyzed pursuant to FED.R.CIV.P. 12(b)(6) rather than 12(b)(1) as argued by Defendants. Recommendation at 4–5. The Tenth Circuit has held that "a motion under FED.R.CIV.P. 12(b)(1) is not an appropriate avenue for questioning an inmate's exhaustion of administrative remedies ... [Rule 12(b)(1)] does not apply to issues of exhaustion under [the Prison Litigation Reform Act]." *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204,

1209 (10th Cir.2003)(reversed on other grounds *Jones v. Bock*, 127 S.Ct. 910, 2007 WL 135890 (U.S. Jan 22, 2007) (NO. 05–7058, 05–7142)). Accordingly, I also find that Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies is governed by FED.R.CIV.P. 12(b)(6).

As to the merits, Magistrate Judge Watanabe recommends that the motion be denied. *Id.* at 6–8. Defendants argue that Plaintiff bears the burden of demonstrating exhaustion of administrative remedies for all claims raised. [# 68 ¶ 8]. Further, Defendants urge that "a complaint that fails to allege the requisite exhaustion of remedies fails to state a claim for relief." *Id.* Finally, Defendants argue that the entire Complaint should be dismissed because "inclusion of unexhausted claim in complaint requires dismissal of entire complaint." *Id.* at ¶ 5 (quoting *Ross v. County of Bernalillo*, 365 F.3d 1181, 118992 (10th Cir.2004). In light of the recent Supreme Court opinion in *Jones v. Bock*, 127 S.Ct. 910, 2007 WL 135890 (U.S. Jan 22, 2007) (NO. 05–7058, 05–7142), Defendants' arguments are without merit.

***2** Magistrate Judge Watanabe's Recommendation was filed before the recent opinion of *Jones v. Bock*, No. 05–7142 was issued. Applying the reasoning and conclusions of *Jones v. Bock*, the same result as Magistrate Judge Watanabe's recommendation is warranted; however, the reasoning behind the decision changes. In *Jones v. Bock*, the Supreme Court held "that failure to exhaust is an affirmative defense under the PRLA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." (*Id.* at 15–16). Further, the Supreme Court held that the "total exhaustion" rule (which requires that where there is an unexhausted claim, the entire complaint be dismissed) is not warranted by the PLRA and, therefore, is abolished. *Id.* at 23. Because a Plaintiff is not required to demonstrate exhaustion in his complaint, I find that Defendants' Motion to Dismiss for failure to Exhaust Administrative Remedies [# 52] is without merit and should be Denied.

Accordingly, for the reasons stated above, it is

ORDERED that the Recommendation of Magistrate Judge Watanabe dated September 29, 2006, is **AFFIRMED AND ADOPTED.** In accordance therewith, it is

ORDERED that the Motion to Dismiss for Failure to Exhaust Administrative Remedies [# 52] is **DENIED.** It is

FURTHER ORDERED that the Motion to Dismiss Official Capacity Claims for Damages is **GRANTED,** this claim is **DISMISSED WITH PREJUDICE.**

RECOMMENDATIONS ON DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO EXHAUST (Docket No. 52) and DEFENDANTS' MOTION TO DISMISS OFFICIAL CAPACITY CLAIMS FOR DAMAGES (Docket No. 53)

MICHAEL J. WATANABE, United States Magistrate Judge.

This case is before the undersigned pursuant to an Order of Reference to Magistrate Judge issued by District Judge Wiley Y. Daniel on March 1, 2006. (Docket No. 22).

The pro se plaintiff, who is incarcerated at the Administrative Maximum Penitentiary in Florence, Colorado ("ADX"), commenced this *Bivens* action in November 2005. According to the Prisoner Complaint, plaintiff is serving a sentence of imprisonment of 117 years and one month following his conviction in the United States District Court for the Southern District of New York based on charges related to the 1993 World Trade Center bombing. (Second Am. Compl., Docket No. 47 at 5). In this action, the plaintiff challenges the implementation of Special Administrative Measures ("SAMs") that severely restrict his communications with the outside world, including his incoming and outgoing mail and his access to the media, the telephone, and visitors. Plaintiff alleges that the defendants violated his First Amendment rights by implementing and imposing the SAMs, that the defendants violated his substantive due process, procedural due process, and equal protection rights when the SAMs were imposed, that they violated his Fourth Amendment rights due to purported unreasonable search and seizures by searching and inspecting his mail, which causes delays, and deprived him of his Sixth Amendment right to have a lawyer, hire a lawyer, or solicit legal assistance per the SAM document. He seeks declaratory, injunctive, and monetary relief.

3 The SAMs were implemented by the ADX Warden in March 2005 at the direction of the U.S. Attorney General pursuant to 28 C.F.R. § 501.3(a). (See Docket No. 32, Notification of Special Administrative Measures). They were imposed for a period not to exceed one year, and they could be reimposed in increments not to exceed one year based on a new risk assessment pursuant to 28 C.F.R. § 501.3(c). In fact, on March 29, 2006, the ADX Warden reimposed and modified the SAMs on the plaintiff for a period of one year. (See Docket No. 47 at 36–48, Notification of Extension/Modification of Special Administrative Measures). With leave of court (Docket No. 45), and without objection by defendants, plaintiff supplemented (see Docket No. 28—motion to supplement) his First Amended Prisoner Complaint to, *inter alia*, include the extended and modified SAMs.

Now before the court are two dispositive motions which were filed by the defendants. One of the motions, defendants' Motion to Dismiss Official Capacity Claims for Damages (Docket No. 53), has been confessed by the plaintiff(Docket No. 60). Accordingly, it is recommended that that motion be granted and that the official capacity claims for damages be dismissed with prejudice. The second motion before the court is the defendants' Motion to Dismiss for Failure to Exhaust (Docket No. 52). Plaintiff has filed a Response to the motion. (Docket No. 61). The court now being fully informed, makes the following findings, conclusions, and recommendation that the motion be denied.

Rule 12(b)(1) of the Federal Rules of Civil Procedure:

empowers a court to dismiss a Complaint for "lack of jurisdiction over the subject matter." Fed.R.Civ.P. 12(b)(1). As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. CONST. art. III, § 2; *Morris v. City of Hobart,* 39 F.3d 1105, 1110 (10th Cir.1994). Statutes conferring jurisdiction on federal courts are to be strictly construed. *See F & S Constr. Co. v. Jensen,* 337 F.2d 160, 161 (10th Cir.1964). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusionary allegations of

jurisdiction." *Groundhog v. Keeler,* 442 F.2d 674, 677 (10th Cir.1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.,* 495 F.2d 906, 909 (10th Cir.1974).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. First, if a party attacks the facial sufficiency of the complaint, the court must accept the allegations of the complaint as true. *See Holt v. United States,* 46 F.3d 1000, 100203 (10th Cir.1995). Second, if a party attacks the factual assertions regarding subject matter jurisdiction through affidavits and other documents, the court may make its own findings of fact. *See id.* at 1003. A court's consideration of evidence outside the pleadings will not convert the the motion to dismiss to a motion for summary judgment under Rule 56. *See id.*

***4** *Cherry Creek Card & Party Shop, Inc. v. Hallmark Marketing Corp.,* 176 F.Supp.2d 1091, 109495 (D.Colo.2001).

For purposes of a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all factual allegations in the complaint as true and resolve all reasonable inferences in plaintiff's favor. *Morse v. Regents of the Univ. of Colo.,* 154 F.3d 1124, 1126 (10th Cir.1998); *Seamons v. Snow,* 84 F.3d 1226, 123132 (10th Cir.1996). A case should not be dismissed for failure to state a claim unless the court determines beyond doubt that plaintiff can prove no set of facts which entitles him to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984); *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957).

Since the plaintiff is not an attorney, his pleadings have been construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. *See Hall v. Bellmon,* 935 F .2d 1106, 1110 (10th Cir.1991) (citing *Haines v. Kerner,* 404 U.S. 519, 520–21 (1972)). Therefore, "if the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.... At the same time, ... it is [not] the proper function of the district court to assume the role of advocate for the pro se litigant." *Id.*

The court first notes that the defendants seek dismissal of the Second Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(1). The Tenth Circuit, however, has held that "a motion under Fed.R.Civ.P. 12(b)(1) is not an appropriate avenue for questioning an inmate's exhaustion of administrative remedies. Rule 12(b)(1) is designed 'for challenges to the court's subject matter jurisdiction.' ... It does not apply to issues of exhaustion under [the Prison Litigation Reform Act]." *Steele v. Federal Bureau of Prisons,* 355 F.3d 1204, 1209 (10th Cir.2003) (citation omitted). Furthermore, "a complaint 'that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted.' " *Id.* at 1210 (citation omitted). Nevertheless, in the interest of judicial economy, the court has considered the defendants' motion as if it was properly made pursuant to Fed.R.Civ.P. 12(b)(6).

Defendants seek dismissal on the ground that the plaintiff has failed to comply with the statutory mandates of the Prisoner Litigation Reform Act by failing to exhaust administrative remedies with respect to his claim regarding the SAMs that were imposed in March 2006. Defendants note that Exhibit C to the original Prisoner Complaint, to which plaintiff refers in his

Second Amended Complaint, demonstrates that the plaintiff contested the SAMs that were imposed on March 18, 2005, by Warden Robert A. Hood, not the SAMs that were imposed on March 29, 2006, by Warden R. Wiley. Defendants assert that because the Second Amended Complaint is challenging the constitutionality of the 2006 SAMs, it contains an unexhausted claim which requires that the entire Complaint be dismissed. *See Ross v. County of Bernalillo,* 365 F.3d 1181, 1189–92 (10th Cir.2004) (total exhaustion rule).

***5** Pursuant to 42 U.S.C. § 1997e(a), "[n]o action shall be brought with respect to prison conditions under ... any ... Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." This "exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002). Furthermore, § 1997e(a) "imposes a pleading requirement on the prisoner." *Steele,* 355 F.3d at 1210. To satisfy the burden of pleading exhaustion, plaintiff must "either attach copies of administrative pleadings or describe their disposition with specificity." *Id.* at 1211.

Here, as noted by the defendants, when indicating on his form Second Amended Prisoner Complaint that he exhausted his available administrative remedies, the plaintiff referenced documents he submitted with his original pleading which concerned his exhaustion of his claims concerning the original SAMs instituted in March 2005. (Docket No. 47 at 30). Those documents establish that the plaintiff fully exhausted his available administrative remedies with respect to those claims. Even though those administrative grievances did not address the SAMs instituted in March 2006, this court agrees with the plaintiff that dismissal of his Second Amended Prisoner Complaint is not warranted on the basis of non-exhaustion.

While defendants rely on *Ross v. County of Bernalillo,* 365 F.3d 1181 (10th Cir.2004), which established the total exhaustion rule, this court finds that *Ross* does not require dismissal of this action. "The *Ross* Court reasoned that the total exhaustion rule would 'encourage prisoners to ... give prison officials the first opportunity to resolve prisoner complaints,' 'facilitate the creation of an administrative record that would ultimately assist federal courts in addressing the prisoner's claims,' 'relieve district courts of the duty to determine whether certain exhausted claims are severable from other unexhausted claims,' and 'avoid at least some piecemeal litigation.' " *Kikumura v. Osagie,* 461 F.3d 1269, 2006 WL 2578805, at *15 (10th Cir. Sept. 8, 2006). None of these policy considerations apply to the circumstances presented here.

As noted by the plaintiff, the March 2006 SAMs extended all of the very same SAMs which were imposed the previous year, with a few additional limits on the frequency and volume of the plaintiff's correspondence with his immediate family members. In addition, the March 2006 SAMs commenced immediately upon the expiration of the prior SAM authorization period and will be in effect for a period of one year. Furthermore, the notification in March 2006 noted that the SAMs could be extended thereafter by Director of the Bureau of Prisons in increments not to exceed one year upon receipt of additional written notification from the Attorney General.

***6** This court agrees with the plaintiff that it makes little sense to have him file new grievances repeating the same issues regarding the SAMs simply because they were extended

with slight modifications. As plaintiff states, "[i]f the plaintiff was to do what the defendants expect, he could never successfully maintain a civil action, because by the time the plaintiff finishes exhausting his remedies with respect to the extended SAM, another extension soon would be due and must start the exhaustion process again and again. Its [sic] an endless cycle of exhaustion regarding the same issue." (Docket No. 61 at 7). Furthermore, as noted by the plaintiff, the court notes that in the Regional Administrative Remedy Appeal Response dated July 3, 2005, plaintiff was advised by the Regional Director that the SAMs "are within the jurisdiction of the United States Attorney General and the Bureau of Prisons has no authority to remove or amend the restrictions imposed." (Docket No. 61–3 at 8). As the Tenth Circuit very recently stated in another exhaustion case, "[a]pplying the total exhaustion rule under such circumstances would simply waste judicial resources and create an unnecessary burden on litigants." *Kikumura v. Osagie,* 2006 WL 2578805, at *15.

WHEREFORE, for the foregoing reasons, it is hereby

RECOMMENDED that the Defendants' Motion to Dismiss for Failure to Exhaust, which was filed on July 12, 2006 (Docket No. 52), be denied. It is further

RECOMMENDED that the Defendants' [unopposed] Motion to Dismiss Official Capacity Claims for Damages, which was filed on July 12, 2006 (Docket No. 53), be **granted.**

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.P. 72(b), the parties have ten (10) days after service of this recommendation to serve and file written, specific objections to the above recommendation with the District Judge assigned to the case. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, Fed.R.Civ.P. 72(b), *Thomas v. Arn,* 474 U.S. 140,14853 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colorado Dep't of* Corrections, 183 F.3d 1205, 1210 (10th Cir.1999); *Talley v. Hesse,* 91 F.3d 1411, 141213 (10th Cir.1996).

D.Colo.,2007.
Ayyad v. Gonzales
Not Reported in F.Supp.2d, 2007 WL 324564 (D.Colo.)

United States District Court,
D. Kansas.
Eric Roland BURKE, Plaintiff,
v.
CORRECTIONS CORPORATION OF AMERICA, et al., Defendants.
Civil Action No. 09–3068–SAC.
March 10, 2010.

Eric Roland Burke, Leavenworth, KS, pro se.

ORDER

SAM A. CROW, Senior District Judge.

***1** Plaintiff proceeds pro se and in forma pauperis on a civil complaint filed while he was confined in a detention facility operated by the Correction Corporation of America (CCA) in Leavenworth, Kansas (CCA–LVN).

In the complaint as first amended, plaintiff complains of his reassignment in December 2009 from general population to placement in "M Pod" for housing prisoners pursuant to Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601, et seq., or for protective custody (PC). Plaintiff claims his placement in PREA/PC is unfounded and unlawfully restricts privileges that were available to him in general population. Plaintiff also contends his assignment to PREA/PC impairs his personal safety because he is identified and labeled by other prisoners as a sexual predator, but in supplemental filings states he has encountered no threats or problems regarding his personal safety when he is with general population prisoners during court appearances and transports to and from the CCA facility.[FN1] Plaintiff further challenges the existence of the death threats cited by CCA staff for classifying plaintiff as needing protective custody, and contends CCA staff is misinterpreting and misapplying PREA.

FN1. Plaintiff's motions to further amend his complaint to provide additional and more recent information about the conditions of his PREA/PC classification are granted and treated as a supplement to the complaint as previously amended.

The defendants named in the complaint are CCA, CCA–LVN Warden Shelton Richardson, CCA–LVN Assistant Warden Robert Mundt, CCA–LVN Chief of Unit Management Kenneth Daugherty, CCA–LVN Chief of Security Bruce Roberts, and CCA–LVN Unit Manager Roger Moore. Plaintiff seeks declaratory and injunctive relief including his return to general population and better training of CCA staff about PREA.

Construed as attempts to proceed under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and 42 U.S.C. § 1983, the court directed plaintiff to show cause why the complaint should not be summarily dismissed as stating no claim upon which relief could be granted. The court found plaintiff could not proceed on his claims under *Bivens* because *Malesko* barred plaintiff from proceeding against CCA, and because the Tenth Circuit in *Peoples v. CCA Detention Centers,* 422 F.3d 1090, 1108 (10th Cir.2005), held there is no cause of action under *Bivens* against individual CCA defendants if alternative remedies are available to the plaintiff in the state courts. The court further found plaintiff could not proceed

under 42 U.S.C. § 1983 because no defendant acted under color of state law for purposes of stating a cognizable claim under that statute.

In response, plaintiff essentially argues the federal courts should be available to remedy constitutional wrongs by a private entity and its employees while providing contracted governmental services, an argument advanced by the *dissent* in *Malesko.* Plaintiff also cites decisions in other circuits that more broadly allow claims against individual defendants of such private entities. As to § 1983, plaintiff relies on cases involving prisoners confined pursuant to *state* rather than *federal* authority, in which private entities were found to be acting under color of state law for the purpose of § 1983.

Plaintiff's Transfer from CCA–LVN

***2** Plaintiff was sentenced on January 27, 2010, in his pending criminal action in the District of Kansas, and has notified the court of his transfer from the CCA–LVN facility to a Bureau of Prisons (BOP) facility. The court finds this action is subject to being dismissed without prejudice because the relief plaintiff seeks is now moot. *See Martin v. Sargent,* 780 F.2d 1334 (8th Cir.1985)(claim for injunctive relief moot if no longer subject to conditions). *See also, Cox v. Phelps Dodge Corp.,* 43 F.3d 1345, 1348 (10th Cir.1994)(declaratory relief subject to mootness doctrine).

No Claim for Relief under Bivens or 42 U.S.C. § 1983

Even if the complaint is not moot, the court continues to find dismissal of this action would be warranted because plaintiff's allegations state no claim for relief under *Bivens* or 42 U.S.C. § 1983, as plaintiff's attempts to avoid the majority's holding in *Malesko,* and the controlling law in this district as set forth in *Peoples,* are without merit.

Moreover, plaintiff's disagreement with his protective custody classification, and dissatisfaction with the restraints imposed on his privileges due to that classification, generally implicate no liberty interest protected by the Due Process Clause. *See Meachum v. Fano,* 427 U.S. 215, 225 (1976). Instead, routine classification decisions for security concerns fall within the broad discretion afforded prison officials in their day-to-day management of detention and correctional facilities. *Hewitt v. Helms,* 459 U.S. 460 (1983); *Hutto v. Finney,* 437 U.S. 678, *rehearing denied,* 439 U.S. 122 (1976). Such deference is appropriate because the managerial task facing prison officials is "at best an extraordinarily difficult undertaking." *Wolff v. McDonnell,* 418 U.S. 539, 566 (1974).

Plaintiff's fear that his PREA/PC classification at CCA–LVN might pose a "possible risk" to his personal safety once in BOP custody is speculative at best, and his mere complaint that he is not allowed the same access to religious services while in protective custody as he enjoyed in general population is insufficient to state an actionable First Amendment claim. Also, notwithstanding plaintiff's statements that he was assigned to the PREA/PC pod for protective custody reasons, his reliance on alleged violations of PREA is misplaced as courts have held that PREA "does not create a right of action that is privately enforceable by an individual civil litigant." *Moorman v. Herrington,* 2009 WL 2020669 (W.D.Ky.2009)(unpublished opinion)(citing cases from other jurisdictions).[FN2] Accordingly, even if the complaint is not

dismissed as moot, it would be dismissed as stating no claim upon which plaintiff can seek relief under federal law, for the reasons stated herein and in the show cause order dated June 10, 2009.

FN2. A copy of that decision is attached.

IT IS THEREFORE ORDERED that plaintiff's motion for the court to order the preparation of a *Martinez* report (Doc. 10), and for reconsideration of the court's order denying appointment of counsel (Doc. 10), are denied.

***3** IT IS FURTHER ORDERED that plaintiff's motion "for leave to amend the complaint as necessary" (Doc. 10), and motions for leave to amend the complaint to provide more recent information (Docs. 11 and 12), are granted and are liberally construed as supplementing the complaint as previously amended.

IT IS FURTHER ORDERED that plaintiff is granted twenty (20) days to show cause why the amended and supplemented complaint should not be summarily dismissed without prejudice because plaintiff's transfer from the CCA Leavenworth facility has rendered plaintiff's claims moot.

IT IS SO ORDERED.

D.Kan.,2010.
Burke v. Corrections Corp. of America
Not Reported in F.Supp.2d, 2010 WL 890209 (D.Kan.)

United States District Court,
D. Colorado.
James Roger Duncan, No. 41762, Plaintiff,
v.
C.O. Jeffrey Quinlin; Major Bildreaya; Captain Zwirn; and Sergeant Graham, Defendants.
Civil Action No. 15–cv–575–LTB
Signed April 13, 2015

James R. Duncan, Sterling, CO, pro se.

ORDER TO DISMISS

LEWIS T. BABCOCK, Senior Judge, United States District Court

***1** Plaintiff, James Roger Duncan, is an inmate currently incarcerated at the Sterling Correctional Facility. Acting *pro se,* he initiated this action by filing a Prisoner Complaint pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement.

A. Applicable Legal Principles

In the Prison Litigation Reform Act (PLRA), Pub. L. No. 104–134, 110 Stat. 1321 (1996), Congress adopted major changes affecting federal actions brought by prisoners in an effort to curb the increasing number of frivolous and harassing law suits brought by persons in custody. Pertinent to the case at bar is the authority granted to federal courts for *sua sponte* screening and dismissal of prisoner claims.

Specifically, Congress significantly amended Title 28 of the United States Code, section 1915, which establishes the criteria for allowing an action to proceed *in forma pauperis* (IFP), *i.e.*, without prepayment of costs. Section 1915(e) (as amended) requires the federal courts to review complaints filed by persons that are proceeding *in forma pauperis* and to dismiss, at any time, any action that is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B).

In addition, Congress enacted a new statutory provision at 28 U.S.C. § 1915A, entitled "Screening," which requires the court to review complaints filed by prisoners seeking redress from a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). If the complaint is "frivolous, malicious, or fails to state a claim upon which relief can be granted," or "seeks monetary relief from a defendant who is immune from such relief," the court must dismiss the complaint. 28 U.S.C. § 1915A(b).

Further, the PLRA substantially amended the Civil Rights of Institutionalized Persons Act, 42 U.S.C.A. § 1997e. In this regard, the PLRA amended section 1997e(c) to require the court "on its own motion or on the motion of a party" to dismiss any action brought by a prisoner with respect to prison conditions under 42 U.S.C. § 1983 if the action is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." *See* 42 U.S.C. § 1997e(c)(1).[FN1]

FN1. When reviewing a complaint for failure to state a claim, the Court may also consider documents attached to the complaint as exhibits. *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1112 (10th Cir. 1991) ("A written document that is attached to the complaint as an exhibit is considered part of the complaint and may be considered in a Rule 12(b)(6) dismissal.")).

Plaintiff is considered a "prisoner" as that term is defined under the PLRA, *see* 28 U.S.C. §§ 1915(h); 1915A(c), and he has been granted leave to proceed IFP in this action (ECF No. 4). Thus his allegations must be reviewed in accordance with 28 U.S.C. § 1915(e)(2)(B). Moreover, his Complaint concerns prison conditions and Defendants are employees of a governmental entity. Thus, his Complaint must be reviewed under the authority set forth above. *See Young v. Davis*, 554 F.3d 1254, 1256 (10th Cir. 2009) ("Because Mr. Blaurock is a prisoner suing government officials, the court is required by federal statute to screen his First Amended Complaint and to dismiss the complaint or any portion thereof that is frivolous, fails to state a claim on which relief may be granted, or seeks relief from a defendant immune from such relief.").

***2** In reviewing complaints under these statutory provisions, a viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.Twombly*, 550 U.S. 554, 556 (2007) (rejecting the traditional standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)). The question to be resolved is: whether, taking the factual allegations of the complaint, which are not contradicted by the exhibits and matters of which judicial notice may be had, and taking all reasonable inferences to be drawn from those uncontradicted factual allegations of the complaint, are the "factual allegations ... enough to raise a right to relief above the speculative level, ... on the assumption that all the allegations in the complaint are true even if doubtful in fact[.]" *Bell Atlantic Corp.*, 550 U.S. at 555. Moreover, a legally frivolous claim is one in which the plaintiff asserts the violation of a legal interest that clearly does not exist or asserts facts that do not support an arguable claim. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). *See Conkleton v. Raemisch*, Civil No. No. 14–1271, —– Fed.Appx. ——, 2015 WL 794901 (10th Cir. Feb. 26, 2015) (upholding in part District Court's dismissal as frivolous of prisoner civil rights complaint); *Ross v. Romero*, 191 Fed.Appx. 682 (10th Cir. 2006) (affirming district court's *sua sponte* dismissal of prisoner's civil rights complaint under 28 U.S.C. § 1915(b).

The Court must construe the Complaint liberally because Plaintiff is a *pro se* litigant. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). If a complaint reasonably can be read "to state a valid claim on which the plaintiff could prevail, [a court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Hall*, 935 F.2d at 1110. However, a court should not act as a *pro se* litigant's advocate. *See id. Sua sponte* dismissal is proper when it is patently obvious that plaintiff could not prevail on the facts alleged, and allowing him an opportunity to amend his complaint would be futile. *Curley v. Perry*, 246 F.3d 1278, 1281–82 (10th Cir. 2001) (internal quotations omitted).

B. Plaintiff's Factual Allegations

Plaintiff's alleges that on or around November 7, 2013, he had reported Defendant Officer Quinlin to a yard Sargent for touching him inappropriately in a pat down search. He claims that Defendant Quinlin came into the medical department later that day to "heart" him for ratting on him. He wrote an informal grievance on the matter that night. Shift Commander Captain Zwirn answered that grievance on or around November 12, 2013 and told Plaintiff that he was crazy and that officer Quinlin was not out to get him. On or around November 15, 2013 Officer Quinlin conducted a pat search of Plaintiff, who again accused Quinlin of touching him inappropriately. When Plaintiff asked Quinlin "do you just like touching me?" Quinlin ordered him to "shut up." As Plaintiff walked away, he stated to Quinlin that "this was harassment!" and Quinlin ordered him to cuff up. Plaintiff alleges that Quinlin pinched his upper arm when he escorted Plaintiff to the North Slider. At the north slider, Sargent Graham took his other arm and helped escort him from the slider to the officer conference room. Plaintiff claims that Sargent Graham saw Quinlin pinching his arm but did not do anything to stop him. On the way to the hole, Sargent Graham refused to listen to him about the "assault." An anatomical exam done on that date indicates one dark purple bruise that "appears to be old." (ECF No. 1, 16). No other injuries are noted.

Plaintiff asserts several causes of action in the present action pursuant to the Civil Rights Act, 42 U.S.C. § 1983. For the reasons stated below, the Complaint and the action will be dismissed pursuant to screening authority set forth above. The pertinent grounds which will result in the dismissal of all claims against all Defendants are addressed below.

C. Liability under 42 U.S.C. § 1983

***3** Plaintiff seeks to assert liability against Defendants pursuant to 42 U.S.C. § 1983. To state a claim under 42 U.S.C. § 1983, a plaintiff must meet two threshold requirements. He must allege: 1) that the alleged misconduct was committed by a person acting under color of state law; and 2) that as a result, he was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330–331 (1986). In addressing a claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed. *Graham v. Connor*, 490 U.S. 386, 393–394 (1989) (internal quotations and citations omitted). The validity of the claim then must be judged by reference to the specific constitutional standard which governs that right. *Id.*

Plaintiff's claims invoke the protections of the Eighth Amendment, which protects individuals against the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This protection, enforced against the states through the Fourteenth Amendment, guarantees incarcerated persons humane conditions of confinement. In this regard, prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)). In addition, the Cruel and Unusual Punishments Clause of the Eighth Amendment protects inmates against the application of excessive force by correctional officers. *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

Every Eighth Amendment claim embodies both an objective and a subjective component. The objective component relates to the "seriousness of the injury" and focuses on whether there has

been a deprivation or infliction of pain serious enough to implicate constitutional concerns. *Hudson v. McMillan*, 503 U.S. 1, 9 (1993). An inmate must show some injury in order to make out a constitutional violation under the Eighth Amendment. The Eighth Amendment "excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.* at 9–10. The subjective component requires inquiry into the defendant's state of mind to determine whether the infliction of pain was "unnecessary and wanton." *Id.* at 6–7. "Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the standard we have described, the case should not go to the jury." *Whitley v. Albers*, 475 U.S. 312, 322 (1986).

1. *Excessive Force*

In an excessive force claim, the core judicial inquiry is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320–21 (quotation omitted). Factors relevant to this inquiry include: the need for application of force; the relationship between that need and the amount of force used; the threat reasonably perceived by the responsible officials; and any efforts made to temper the severity of a forceful response. *Hudson*, 503 U.S. at 7 (citations omitted). The absence of serious injury is a relevant, but not dispositive, additional factor to be considered in the subjective analysis. *Id.*

As stated above, however, the Eighth Amendment does not protect an inmate against an objectively *de minimis* use of force. "There exists some point at which the degree of force used is so minor that a court can safely assume that no reasonable person could conclude that a corrections officer acted maliciously and sadistically." *Reyes v. Chinnici*, 54 Fed.Appx. 44, 48–49 (3d. Cir. 2002) (holding force was *de minimis* where corrections officer punched inmate in the shoulder to avoid being spit on). *Accord Thomas v. Ferguson*, 361 F.Supp.2d 435, 439–41 (D.N.J. 2004) (finding that, "[e]ven if proven to be true and for no necessary purpose, Defendants' alleged conduct ... does not meet the Constitutional standard for a claim of a malicious and sadistic use of force 'repugnant to the conscience of mankind,' " where inmate alleged he was punched and shoved by corrections officers).

***4** Here, Plaintiff's allegations, along with his medical evidence, fail to describe a use of force that is "repugnant to the conscience of mankind." Rather, the allegations show that the use of force was objectively *de minimis* and insufficient to establish an Eighth Amendment violation. The Supreme Court explained in *Hudson* as follows.

That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. *See Johnson v. Glick*, 481 F.2d, at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort " 'repugnant to the conscience of mankind.' " *Whitley*, 475 U.S., at 327 (quoting *Estelle*, supra, 429 U.S., at 106) (internal quotation marks omitted).

Hudson, 503 U.S. at 9–10.

Here, the only injury Plaintiff claims is that he suffered a three-inch bruise. This bare allegation, combined with his medical examination taken on the same date right after the incident, which provides that the bruise was "dark purple" already and "appears to be old," support a conclusion that the force used with respect to the instant action was *de minimis*. Thus, viewing the facts as alleged by Plaintiff in a light most favorable to him, the court concludes that the use of force by defendant Quinlin is, at best, a *de minimis* use of physical force, which is excluded from the Eighth Amendment's prohibition of cruel and unusual punishments as such contact is not of a sort repugnant to the conscience of mankind. *Accord Sepulveda v. Burnside*, 170 Fed.Appx. 119, 124 (11th Cir. 2006) (claim that officer "jerked inmate by the ankle while checking his leg shackles did not rise to the level of a constitutional violation.); *McCall v. Crosthwait*, 336 Fed.Appx. 871, 872 (11th Cir. 2009) (no constitutional violation occurred where officer pushed detainee out of jail's elevator causing inmate to hit partially open steel door and fall against plexiglass window thereby suffering bruised shoulder and elbow); *Johnson v. Moody*, 206 Fed.Appx. 880, 885 (11th Cir. 2006) (minor nature of injury suggested that officer's pushing or kicking metal tray door on inmate's hand was de minimis use of force which did not constitute Eighth Amendment violation); *Jackson v. Buckman*, 756 F.3d 1060, 1068 (8th Cir. 2014) (holding that a "karate hit" that did not leave a cut or scratch was a *de minimus* use of force that failed to rise to the level a constitutional violation); *Askew v. Millerd*, 191 F.3d 953, 958 (8th Cir. 1999) (providing that: "Section 1983 is intended to remedy egregious conduct, and not every assault or battery which violates state law will create liability under it"); *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990) (injuries of abrasions on wrists with no evidence of follow-up treatment failed to demonstrate excessive force). *See also Dockery v. Beard*, Civil No. 12–3317, 2013 WL 139624, 2–3 (3d Cir. Jan. 11, 2013) (evidence of slight abrasions indicated that officers applied minimal force in a good-faith effort to maintain or restore discipline when prisoner failed to obey order); *Burr v. Hasbrouck Heights Police Dept.*, 131 Fed.Appx. 799, 803 (3d Cir. 2005) (no unreasonable force was used in arresting plaintiff because "small bruises" on her arms did not suggest objectively unreasonable force); *Hill v. Kelly*, 1997 WL 638402 (E.D. Pa. 1997) (bruise and a cut on his thumb as a result of the door closing on his thumb is the kind of *de minimis* imposition with which the Constitution is not concerned); *Barber v. Grow*, 929 F.Supp. 820 (E.D. Pa. 1996) (some cuts and bruises to arm and knee suffered from guard pulling chair out from under inmate presents no set of facts that a reasonable jury could find intentional wanton behavior).

***5** Thus, while Defendant Quinlin's actions may have been unprofessional, his *de minimus* use of force against Plaintiff does not rise to the level of a constitutional violation. Thus, Plaintiff's excessive force claim against Defendant Quinlin will be dismissed.

2. *Failure to Intervene*

Next, Plaintiff asserts that Defendant Graham is liable for failing to intervene when she allegedly saw Quinlin pinch Plaintiff. "[A] law enforcement official who fails to intervene to prevent another law enforcement official's use of excessive force may be liable under § 1983." *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996) (asserting that an officer may be liable for a failure to intervene if he " watched the incident and did nothing to prevent it."). Specifically, "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985). Thus, a corrections officer's failure to

intervene in a beating can be the basis for liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and refused to do so. *Gruenwald v. Maddox,* 274 Fed.Appx. 667 (10th Cir. 2008). However, in order for liability to attach under section 1983 for the failure to intervene in another's use of excessive force, a plaintiff must show that: (1) the defendant failed or refused to intervene when a constitutional violation took place in his or her presence or with his or her knowledge; and (2) there was a realistic and reasonable opportunity to intervene. *Smith v. Messinger,* 293 F.3d 641, 651 (3d Cir. 2002); *Lanigan v. Village of East Hazel Crest,* 110 F.3d 467, 477 (7th Cir. 1997).

However, for there to be a failure to intervene, it follows that "there must exist an underlying constitutional violation." *Harper v. Albert,* 400 F.3d 1052, 1064 (7th Cir. 2005); *Sanders v. City of Union Springs,* 207 Fed.Appx. 960, 965–66 (11th Cir. 2006); *Ford v. Fleming,* 229 F.3d 1163, 2000 WL 1346392 (10th Cir. Sept. 19, 2000) (unpublished op.) (holding that claims involving a failure to intervene were precluded by the jury's conclusion that no constitutional violations had taken place). Here, there was no duty to intervene because there was no unconstitutional use of force. As such, Plaintiff's claim against Defendant Graham will be dismissed as well.

3. *Failure to Protect*

Plaintiff's allegations are liberally construed as attempting to state a claim of failure to protect against Defendant Zwirn. Clearly, a prisoner is entitled to reasonable protection against assault by another inmate. *Berry v. City of Muskogee, Okl.,* 900 F.2d 1489 (10th Cir. 1990). However, Plaintiff has failed to allege sufficient facts to support such a claim. A claim of failure to protect is evaluated under the Eighth Amendment, which, as stated above, has "both an objective and a subjective component." *Sealock v. Colorado,* 218 F.3d 1205, 1209 (10th Cir. 2000). The objective component of the test is met if the harm suffered is "sufficiently serious" to implicate the Cruel and Unusual Punishment Clause. To satisfy this component, the inmate must show that she was incarcerated under conditions posing a substantial risk of serious harm. The subjective component "is met if a prison official 'knows of and disregards an excessive risk to inmate health or safety.' " *Sealock,* 218 F.3d at 1209 (quoting *Farmer,* 511 U.S. at 837). Under this component, the inmate must establish that prison officials had a sufficiently culpable state of mind in allowing the deprivation to take place. *Verdicia v. Adams,* 327 F.3d 1171, 1175 (10th Cir. 2003) (quoting *Benefield v. McDowall,* 241 F.3d 1267, 1271 (10th Cir. 2001)). To be liable for unsafe conditions of confinement the prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he (or she) must also draw the inference." *Farmer,* 511 U.S. at 837; *Gonzales v. Martinez,* 403 F.3d 1179, 1186 (10th Cir. 2005). Both components must be satisfied. *Callahan v. Poppell,* 471 F.3d 1155, 1159 (10th Cir. 2006).

***6** A sufficiently serious prison condition is one which exposes an inmate to "a substantial risk of serious harm." *Reynolds v. Powell,* 370 F.3d 1028, 1031 (10th Cir. 2004). Prison conditions may be harsh and restrictive without violating constitutional rights, *Barney v. Pulsipher,* 143 F.3d 1299, 1311 (10th Cir. 1998), and the relevant inquiry involves a review of the "circumstances, nature, and duration" of the conditions with "the length of exposure to the conditions ... of prime importance." *DeSpain v. Uphoff,* 264 F.3d 965, 974 (10th Cir. 2001).

Here, again, Plaintiff merely was subjected to a *de minimus* use of force when a guard walked him to the hole with a tight grip on his arm allegedly leaving a bruise. This is not the type of unsafe condition of confinement for which Defendant Zwirn can be held liable on the basis of failure to protect. Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers,* 475 U.S. 312, 319 (1986). "Mere negligence does not constitute deliberate indifference." *Smith v. Cummings,* 445 F.3d 1254, 1258 (10th Cir. 2006); *see also Board of County Commissioners v. Brown,* 520 U.S. 397, 407–10 (1997) (A higher standard is required than simple negligence or heightened negligence). Thus, negligent failure to protect inmates from assaults by other inmates is not actionable under the Eighth Amendment. *Farmer,* 511 U.S. at 835. An official's failure to alleviate a significant or obvious risk that he should have perceived but did not, "while no cause for commendation," does not constitute a violation of the Eighth Amendment. *Id.* at 838. Consequently, Plaintiff's claim against Defendant Zwirn will be dismissed as well.

4. *Verbal Threats*

In his Fourth claim, Plaintiff asserts that on or around November 19, 2013, Major Raymond Bilderaya came to his cell in the hole to interview him about the letter he had written to Warden Falk. In the interview, Major Bilderaya saw the bruise but refused to write anything in his report about it. Then he threatened Plaintiff that he would write him up in for writing the warden and "ratting" on Quinlin.

No matter how inappropriate, verbal harassment and threats, without more, do not state an arguable constitutional claim. *See McBride v. Deer,* 240 F.3d 1287, 1291 n. 3 (10th Cir. 2001) ("[A]cts or omissions resulting in an inmate being subjected to nothing more than threats and verbal taunts do not violate the Eighth Amendment."); *Northington v. Jackson,* 973 F.2d 1518, 1524 (10th Cir. 1992) ("necessarily excluded from the cruel and unusual punishment inquiry" are "verbal threats and harassment); *Cumbey v. Meachum,* 684 F.2d 712, 714 (10th Cir. 1982) (*per curiam*); *Collins v. Cundy,* 603 F.2d 825, 827 (10th Cir. 1979) (*per curiam*).[FN2] Thus, Plaintiff's claim against Defendant Bilderaya must be dismissed.

FN2. Moreover, while use of racial epithets are inexcusable and offensive, they do not amount to a constitutional violation. *Moore v. Morris,* 116 Fed.Appx. 203, 205 (10th Cir. 2004).

5. *Warden James Falk*

Although not identified in the caption of his Complaint, Plaintiff lists Warden James Falk as a Defendant in the body of his Complaint (ECF No. 1, p.2). To state a claim under § 1983, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009). Government officials cannot be held liable merely by the fact of their supervisory position. *Grimsley v. MacKay,* 93 F.3d 676, 679 (10th Cir. 1996). However, plaintiffs may hold defendants who are supervisors liable under a theory of supervisory liability by showing: "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Pahls v. Thomas,* 718 F.3d 1210, 1225 (10th Cir. 2013) (quoting *Dodds v. Richardson,* 614 F.3d 1185, 1199 (10th Cir. 2010)). Because Mr. Duncan alleges a violation of his Eighth Amendment rights, the mental

state he must show is "one of deliberate indifference." *Tafoya v. Salazar*, 516 F.3d 912, 916 (10th Cir. 2008). This requires that the defendant "actually be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (internal quotation omitted).

***7** Mr. Duncan does not allege that Defendant Falk personally participated in the incident. To the extent Mr. Duncan seeks to allege supervisory liability, he has failed to do so. While Mr. Duncan alleges in his amended complaint that Defendant Falk "was the Warden at the Sterling Correctional Facility at the time this action took place and is responsible to CO Quinlin [training] and action," he does not allege that Falk personally was aware of or deliberately indifferent to a substantial risk of harm to him. Mr. Duncan does not allege any facts supporting an inference that Falk was aware of a particular risk to him on November 15, 2013. *See Tafoya*, 516 F.3d at 916 ("An official's failure to alleviate a significant risk of which he was unaware, no matter how obvious the risk or how gross his negligence in failing to perceive it, is not an infliction of punishment and therefore not a constitutional violation."). Accordingly, Mr. Duncan has not adequately pleaded supervisory liability under § 1983 or a *prima facie* case of violation of his Eighth Amendment rights. Thus, any claim against Defendant Falk will be dismissed as well.

6. *Negligence*

As a final matter, throughout his Complaint, Plaintiff makes reference to Defendants' negligence. Negligence, even by state prison employees, does not arise to a federal constitutional violation. The Supreme Court repeatedly has made it patently clear that negligence claims cannot support liability under section 1983. *See, e.g., County of Sacramento v. Lewis,* 523 U.S. 833 (1998); *Collins v. City of Harker Heights, Texas,* 503 U.S. 115 (1992); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (clarifying that lack of due care by prison officials does not state a claim under either the substantive or the procedural aspects of the Due Process Clause); *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that "the Due Process clause is simply not implicated by a negligent act of an official causing unintended loss or injury to life, liberty or property"). Thus, simple negligence is a tort claim that must be litigated in state court.

D. Conclusion

The federal courts are not overseers of the day-to-day management of prisons. Prison officials require broad discretionary authority as the "operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). Accordingly, prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve internal order and to maintain institutional security. *Beard v. Banks*, 548 U.S. 521 (2006); *Bell v. Wolfish*, 441 U.S. 520, 527 (1979).

Accepting the facts in the complaint as true, but not the conclusory statements, the Court concludes that Plaintiff has not alleged sufficient facts to state a plausible federal constitutional violation against any named Defendant. Moreover, allowing Plaintiff to amend his complaint would be futile. Consequently, this action will be dismissed. Accordingly, it is

ORDERED that the Complaint and this action are DISMISSED with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B), 28 U.S.C. § 1915A and/or 42 U.S.C.A. § 1997e. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Plaintiff files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

D.Colo., 2015
Duncan v. Quinlin
Not Reported in F.Supp.3d, 2015 WL 1726802 (D.Colo.)

United States District Court,
D. Colorado.
Marcus Leland FREEMAN, Plaintiff,
v.
WOOLSTON, Vocational Instructor, Liken, Educational Department, Defendants.
Civil Action No. 11–cv–01756–DME–MJW.
March 28, 2013.

Marcus Leland Freeman, Lewisburg, PA, pro se.

Marcy Elizabeth Cook, U.S. Attorney's Office, Denver, CO, for Defendants.

ORDER ADOPTING IN PART, REJECTING IN PART THE MAGISTRATE JUDGE'S RECOMMENDATION

DAVID M. EBEL, Circuit Judge.

***1** This matter comes before the Court on the parties' objections (Docs.190, 192) to the magistrate judge's report and recommendation, dated December 14, 2012, which addresses the parties' cross-motions for summary judgment (Doc. 186). After considering the parties' objections, the Court ADOPTS the magistrate judge's recommendation IN PART, and REJECTS it IN PART. The Court, therefore, DENIES Plaintiff Marcus Freeman's motion for summary judgment (Doc. 151), and GRANTS in part and DENIES in part Defendants' motion for summary judgment (Doc. 129).

I. Preliminary discovery matter

In his objections, Freeman raises a preliminary matter. He contends that the magistrate judge erred in not giving him more time to locate witnesses, after the discovery deadline passed. Since Freeman raised this issue in his objections, however, the Court has affirmed the magistrate judge's decision denying Freeman more time for discovery. *See Garcia v. U.S. Air Force*, 533 F.3d 1170, 1179–80 (10th Cir.2008) (holding district court did not abuse its discretion in denying Fed.R.Civ.P. 56(f) (now Rule 56(d)) motion where movant already had six months to conduct the requested discovery).

II. Standard of review

This court must review de novo any part of the magistrate judge's recommendation to which there has been a timely objection.[FN1] 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b)(3); *see also Garrett v. BNC Mort., Inc.*, —— F.Supp.2d ——, 2013 WL 878749, at *1 (D.Colo. Mar.7, 2013).

FN1. The magistrate judge recommends denying Freeman's motion for summary judgment, and Freeman does not expressly object to that recommendation. Further, it is appropriate to deny Freeman's summary judgment motion because, in it, Freeman argued that there are disputed issues of fact that require a trial. The Court, therefore, ADOPTS the magistrate judge's recommendation in this regard and DENIES Freeman's summary judgment motion.

As previously mentioned, the magistrate judge's recommendation addresses the parties' cross-motions for summary judgment. The Court must “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." Fed.R.Civ.P. 56(a). "In determining whether the moving party is entitled to judgment as a matter of law based on the record, we review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmovant." *Constitution Party of Kan. v. Kobach*, 695 F.3d 1140, 1144 (10th Cir.2012) (addressing cross-motions for summary judgment) (internal quotation marks omitted). Because Freeman is proceeding pro se, the Court liberally construes his pleadings. *See Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

III. Freeman's claims

The magistrate judge thoroughly set forth Freeman's allegations.[FN2] Briefly summarized, Freeman, a federal prisoner, asserts *Bivens* [FN3] claims alleging that Bureau of Prisons ("BOP") guards, Defendants Phil Woolston and Robert Liken,[FN4] violated the Eighth Amendment by assaulting Freeman on two separate occasions. To succeed on these claims, Freeman "must show (1) that the alleged wrongdoing was objectively harmful enough to establish a constitutional violation; and (2) that defendants acted with a sufficiently culpable state of mind." *Norton v. City of Marietta,* 432 F.3d 1145, 1154 (10th Cir.2005) (per curiam); *see also Hudson v. McMillian,* 503 U.S. 1, 8, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

FN2. The Court accepts Freeman's assertion, in his objections, that he alleged that prison medical personnel waited over an hour to examine him after the July 6, 2010 incident. Despite this allegation, however, Freeman did not assert a separate cause of action alleging the unconstitutional deprivation of medical treatment.

FN3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

FN4. Although Freeman identified this Defendant as Liken, Defendants assert that his name is, instead, Likens. Because Defendants have not moved to correct the caption, however, the Court will continue to refer to this Defendant as Liken. *See Murphy v. Gardner,* 413 F.Supp.2d 1156, 1160 n. 2 (D.Colo.2006).

A. First incident—July 6, 2010

***2** Regarding the first incident, the evidence, viewed in the light most favorable to Freeman, establishes the following: As Woolston was escorting the handcuffed Freeman out of his cell, Woolston, without provocation, grabbed Freeman's arm forcefully, shoved Woolston so that his face hit the cell door frame, shoved him again so that his shoulder hit a locker in the cell, and threw him to the ground. Liken then helped Woolston drag Freeman, on his knees, back into the cell, where the two guards twisted Freeman's arms upward and hit him more than ten times about the head and neck with closed fists. As a result of this assault, Freeman alleged he suffered injuries to both knees and pain in his shoulder, neck and head. Prison officials treated Freeman for a skinned knee.[FN5]

FN5. Defendants dispute Freeman's version of this incident, asserting instead that Freeman struggled with Woolston, as Woolston tried to escort Freeman from his cell, requiring Defendants to force Freeman against the cell door frame and then take him to the ground in an attempt to regain control over him. At the summary-judgment stage of this litigation, however,

the Court must view the evidence in the light most favorable to Freeman.

1. Whether the alleged wrongdoing was objectively harmful enough to establish a constitutional violation

The magistrate judge recommends granting Defendants summary judgment as to this incident because Freeman failed to establish that Defendants' alleged wrongdoing was "objectively harmful enough to establish a constitutional violation." (Doc. 186 at 9 (internal quotation marks omitted).) More specifically, the magistrate judge determined that Freeman had "fail[ed] to state a claim of constitutional magnitude because the force used against [Freeman] was both de minimus and not of a nature that is repugnant to mankind ." (*Id.* at 9–10.) Freeman objects to the magistrate judge's recommendation.

Freeman is correct that, to prevail on his Eighth Amendment claim, he does not have to prove that he suffered serious injuries as a result of the alleged assault. *See Wilkins v. Gaddy,* 559 U.S. 34, 130 S.Ct. 1175, 1176, 175 L.Ed.2d 995 (2010) (citing *Hudson,* 503 U.S. at 4). The extent of his injuries is, however, one factor that may bear on whether the force applied was de minimis. *See id.* Nonetheless, "[i]njury and force ... are only imperfectly correlated, and it is the latter that ultimately counts." *Id.* at 1178.

In this case, Freeman's evidence (his own statements based on his personal knowledge and made under oath or penalty of perjury, *see Hall v. Bellmon,* 935 F.2d 1106, 1111 (10th Cir.1991)), indicates that Defendants used more than de minimis force against him. While Defendants cite cases where courts have determined, as a matter of law, that a push or a shove resulting in only minor injury was use of de minimis force, here Freeman's evidence indicates, to the contrary, that Defendants pushed and shoved the handcuffed Freeman several times into solid objects, then took him to the ground and hit him numerous times about the head and back with closed fists. *Cf. United States v. LaVallee,* 439 F.3d 670, 686–87 (10th Cir.2006) (noting, in criminal prosecution of prison guards for beating inmates, that parties did not dispute at trial that hitting a restrained and compliant inmate "in the back numerous times," where "the sound of the blows could be heard in another room fifteen to twenty feet away," was more than de minimis force). Freeman's evidence, thus, creates a genuinely disputed issue of material fact, sufficient to survive summary judgment, as to whether Defendants applied more than de minimis force against Freeman. *Cf. Ali v. Dinwiddie,* 437 F. App'x 695, 697–98, 700 (10th Cir.2011) (unpublished) (concluding that there was a material issue of fact as to whether prison guards used more than de minimis force where inmate alleged that guards punched and kicked him after he was handcuffed and not resisting, where inmate suffered abrasions to his wrist, contusions to his head, and bruising and pain in his shoulder which restricted inmate's abduction of his shoulder even one and one-half years later). The Court's review of the video evidence does not resolve this factual dispute.

2. Whether Defendants acted with a sufficiently culpable state of mind

***3** Freeman must also establish that Defendants "acted with a sufficiently culpable state of mind." *Norton,* 432 F.3d at 1154. "Th[is] subjective element of an excessive force claim turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Smith v. Cochran,* 339 F.3d 1205, 1212 (10th Cir.2003) (internal quotation marks omitted); *see also Hudson,* 503 U.S. at 7. Freeman's

evidence, accepted as true, indicates that Defendants assaulted him without any provocation. Under these circumstances, that is sufficient for Freeman's claim to survive summary judgment.

3. Qualified immunity

Although the magistrate judge did not address the issue, Defendants also moved for summary judgment on the basis of qualified immunity. And Defendants objected to the magistrate judge's recommendation because it did not grant them qualified immunity.

In light of Defendants' assertion of qualified immunity, Freeman had the burden of showing both (1) that Defendants violated Freeman's constitutional rights and (2) that those rights were clearly established at the time of the incident, on July 6, 2010. *See Becker v. Bateman,* —— F.3d ——, 2013 WL 697910, at *2 (10th Cir. Feb.27, 2013). As just discussed, Freeman sufficiently established a claim that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment when they purportedly assaulted him without provocation. *See Smith,* 339 F.3d at 1215. And an inmate's right to be free from cruel and unusual punishment, in the form of such a malicious and sadistic application of excessive force against him by prison guards, was clearly established prior to the date of this incident. *See Hudson,* 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (decided in 1992); *see also Allen v. Zavaras,* 474 F. App'x 741, 744 (10th Cir.) (unpublished) (noting that, "[t]o determine whether the correctional officers' use of force violated [an inmate's] clearly established rights under the Eighth Amendment, we ask 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm' " (quoting *Hudson,* 503 U.S. at 6–7)), *cert. denied,* 133 S.Ct. 656 (2012).

4. Conclusion as to Freeman's claim based on the July 6, 2010 incident

For the foregoing reasons, the Court REJECTS the magistrate judge's recommendation as to this claim in part and DENIES Defendants summary judgment. A factfinder will, thus, have to decide whether Freeman's version of events or Defendants' version is more credible. *See Norton,* 432 F.3d at 1152–54; *see also Ali,* 437 F. App'x 695. The Court notes, without deciding at this juncture, that even if Freeman succeeds at trial on this claim, the apparently modest nature of his alleged injuries may limit the damages he may recover. *See Wilkins,* 130 S.Ct. at 1180.

B. December 14, 2010 incident

***4** Regarding the December 14, 2010 incident, the evidence, viewed in the light most favorable to Freeman, establishes the following: Woolston was supervising at least ten inmates, including Freeman, in the prison's education department. Freeman became upset when he did not receive "material to type court documents" and he "tapped" the glass window in Woolston's office. (Docs. 6 at 11; 129–4 at 8.) Woolston asked Freeman to come into the office, but Freeman refused. Woolston then ordered Freeman to get down on the ground, but Freeman refused. Woolston, therefore, took Freeman to the ground and restrained him. As a result, Freeman suffered a one-inch scratch on his right knee. Freeman asserts that Woolston unjustifiably attacked him in retaliation for Freeman's filing a complaint against Woolston for the July 6, 2010 incident.

The magistrate judge, focusing on the question of whether the alleged wrongdoing was objectively harmful enough to establish a constitutional violation, recommends granting

Defendant Woolston summary judgment on this claim because Woolston's "use of force was justified to restore discipline and security." (Doc. 186 at 10–11.) The Court agrees, in light of the video evidence and the fact that Freeman himself admits being angry, "tapping" Woolston's office window and refusing to obey Woolston's directions to come into his office and to get down on the ground. *See Green v. Denning,* 465 F. App'x 804, 806–07 (10th Cir.2012) (unpublished) (affirming summary judgment for prison guard where undisputed facts indicated "that the decision to bring [inmate] to the ground was appropriate" because the inmate "had recently exhibited erratic behavior, was outside of his cell, and refused to return").

Freeman does not further allege that Woolston used more force than necessary to take Freeman to the ground and restrain him. And, although the extent of an inmate's injuries would not by itself conclusively preclude him from prevailing on an excessive force claim, here Freeman's minor injury—a scratch on his knee-supports the conclusion that Woolston used de minimis and appropriate force against Freeman.

For these reasons, the Court ADOPTS the magistrate judge's recommendation as to this claim. Therefore, the Court DENIES Freeman summary judgment on this claim, and GRANTS Woolston summary judgment.

IV. Appointment of counsel

In his objections, Freeman asserts that he has been denied appointed counsel. Freeman, however, is not entitled to appointed counsel to assist him in pursuing the civil claims he alleges in this action. *See Lanier v. Bryant,* 332 F.3d 999, 1002, 1005–06 (6th Cir.2003) (noting, in case brought in part under *Bivens,* that "appointment of counsel in a civil proceeding is not a constitutional right and is justified only in exceptional circumstances"); *see also Steffey v. Orman,* 461 F.3d 1218, 1220, 1223–24 (10th Cir.2006) (addressing 42 U.S.C. § 1983 claim).

Nevertheless, the Court liberally construes Freeman's assertion that he has been denied appointed counsel as the renewal of his request for counsel. The Court has discretion, under 28 U.S.C. § 1915(e)(1), "to request an attorney to represent" a civil litigant like Freeman who is proceeding in forma pauperis. *See Johnson v. Johnson,* 466 F.3d 1213, 1217 (10th Cir.2006) (per curiam). In exercising that discretion, the Court "consider[s] a variety of factors, including the merits of the litigant's claims, the nature of the factual issues raised by the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims." *Williams v. Meese,* 926 F.2d 994, 996 (10th Cir .1991) (addressing 28 U.S.C. § 1915(d), which was later redesignated § 1915(e)(1)); *see also Hill v. SmithKline Beecham Corp.,* 393 F.3d 1111, 1115 (10th Cir.2004) (applying § 1915(e)(1)). Considering these factors as they pertain to this case, the Court conditionally GRANTS Freeman's renewed motion for counsel and, in the interest of judicial efficiency, requests the assistance of the Clerk of the Court to attempt to secure pro bono counsel to represent Freeman. The condition of this grant is the ability of the Court to secure an attorney who will provide pro bono, uncompensated, representation of Freeman. Freeman's lack of a right to counsel and the lack of sufficient judicial resources to pay for counsel causes this Court only to undertake an effort to secure pro bono volunteer counsel. If the Court is not successful in securing pro bono counsel for Freeman, then Freeman's request for counsel will be denied.

V. Conclusion

***5** For the foregoing reasons, the Court ORDERS the following:

The parties' objections (Docs.190, 192) to the magistrate judge's report and recommendation are OVERRULED in part and GRANTED in part; and the magistrate judge's report and recommendation (Doc. 186) is, thus, ADOPTED in part and REJECTED in part.

Freeman's motion for summary judgment (Doc. 151) is DENIED in full.

Defendants' motion for summary judgment (Doc. 129) is GRANTED in part and DENIED in part: Defendants are DENIED summary judgment as to Freeman's first claim, but Defendant Woolston is GRANTED summary judgment on Freeman's second claim.

Freeman's request for the appointment of counsel is GRANTED to the extent that pro bono representation can be found. Otherwise, his request for appointment of counsel will be DENIED. In the interest of judicial efficiency, the Court requests the assistance of the Clerk of the Court in attempting to secure counsel for Freeman.

As a housekeeping matter, the Court grants Freeman's "Motion to Show Cause" (Doc. 195), docketed January 25, 2013, seeking to "show cause why he has no assets and no means by which to make [one of the] monthly payment[s]" owed on the filing fee (Doc. 3 at 2).

Finally, the Court requests that the magistrate judge set a final pretrial conference and conduct such other proceedings and enter such other orders as may be appropriate, consistent with this Order.

D.Colo.,2013.
Freeman v. Woolston
Not Reported in F.Supp.2d, 2013 WL 1283813 (D.Colo.)

United States District Court,
D. Kansas.
James VAN HOUTEN, Plaintiff,
v.
CSI Andrew GASKILL, Defendant.
No. 05–3377–JAR.
March 22, 2006.

James Van Houten, El Dorado, KS, pro se.

Ralph J. Dezago, Office of Attorney General, Topeka, KS, for Defendant.

MEMORANDUM AND ORDER

ROBINSON, J.

***1** Plaintiff James Van Houten, proceeding pro se, filed this action alleging defendant CSI Andrew Gaskill violated his Eighth and Ninth Amendment rights. This matter comes before the Court on a Motion to Dismiss for failure to state a claim for relief under Fed.R.Civ.P. 12(b)(6) filed by the defendant (Doc. 8). For the reasons explained below, the motion is granted in part and denied in part.

Factual Background

Consistent with the well established standards for analyzing a motion to dismiss for failure to state a claim, the Court will look no further than the allegations in plaintiff's complaint, which the Court accepts as true.[FN1]

FN1. *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir.2004) (it is generally unacceptable for the court to look beyond the four corners of the complaint when deciding a Rule 12(b)(6) motion to dismiss).

Plaintiff is an inmate currently in the custody of the Kansas Secretary of Corrections and confined at the El Dorado Correctional Facility ("EDCF") in El Dorado, Kansas. Plaintiff alleges that defendant Gaskill, a state official, subjected him to excessive force in an incident on May 12, 2004, when he was punched in the face twice by Officer Gaskill. Plaintiff was restrained at the time of the incident, and claims that he suffered scrapes, cuts and abrasions to his face. He alleges that this action violated his Eighth and Ninth Amendment rights. Plaintiff requests the following relief: (1) $25,000 punitive damages; (2) the criminal indictment of Officer Gaskill; and (3) the firing or demotion of Officer Gaskill.

Defendant moves to dismiss plaintiff's case because his § 1983 claim fails to state a claim upon which relief may be granted. Defendant argues: (1) a request for solely punitive damages is not cognizable in federal court; and (2) federal courts do not have the jurisdiction either to force an indictment upon the defendant or to force the defendant to be fired or demoted.

Standard of Review

The court will dismiss a cause of action for failure to state a claim only when "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claims which would

entitle him to relief," [FN2] or when an issue of law is dispositive.[FN3] The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, and all reasonable inferences from those facts are viewed in favor of the plaintiff.[FN4] The issue in resolving a motion such as this is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." [FN5] In a pro se case, the pro se litigant's pleadings are to be liberally construed and are held to a less stringent standard.[FN6]

FN2. *Aspenwood Investment Co. v. Martinez,* 355 F.3d 1256, 1259 (10th Cir.2004) (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

FN3. *Neitzke v. Williams,* 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

FN4. *Adams v. Kinder–Morgan, Inc.,* 340 F.3d 1083, 1088 (10th Cir.2003).

FN5. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

FN6. *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir.1991).

Discussion

Defendant does not argue that plaintiff's claim has no merit but rather, that the court lacks jurisdiction to grant the requested relief. Both legal and equitable relief are available under § 1983 against individuals whose conduct is violative of these constitutional protections. Plaintiff's complaint seeks no specific compensatory damages, only punitive damages and other affirmative relief. Generally speaking, when a plaintiff does not include a prayer for compensatory damages, punitive damages are not available. Nevertheless, the fact that plaintiff ought to be afforded an opportunity to test his claim on the merits if the underlying facts and circumstances may be a proper subject of relief leads the Court to conclude that his Complaint should be liberally construed to assert a claim for at least nominal damages.[FN7] Plaintiff's Complaint alleges that defendant struck him twice in the face while he was in restraints, and that he suffered scrapes, cuts and abrasions to his face. The nature of a plaintiff's injuries is only one factor in the determination of whether the use of force constituted an Eighth Amendment violation.[FN8] When a prison official maliciously and sadistically uses force to cause harm to a prisoner, the Eighth Amendment is violated, regardless of whether significant injury results.[FN9] Thus, the Court will deny defendant's motion to dismiss on these grounds.

FN7. *See generally Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (discussing nature of leave to amend complaint).

FN8. *Hudson v. McMillian,* 503 U.S. 1, 9–11, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

FN9. *Jackson v. Austin,* 241 F.Supp.2d 1313, 1319 (D.Kan.2003) (citing *Whitley v. Albers,* 475 U.S. 312, 327, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).

***2** As for the other relief requested, this Court's ability to order prospective relief by mandatory and prohibitory injunctions has been limited by the Prison Litigation Reform Act ("PLRA") in 18 U.S.C. § 3626(a)(1)(A), which reads as follows:

Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

A decision whether or not to indict or charge a person with a crime has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed ." [FN10] Moreover, whether to fire or demote an employee is a personnel issue beyond the jurisdiction of this Court. Thus, defendant is correct that plaintiff cannot assert these claims for affirmative relief.
FN10. U.S. Const., Art. II, § 3.

IT IS THEREFORE ORDERED BY THE COURT that defendant's motion to dismiss (Doc. 8) is GRANTED with respect to his claims for affirmative relief and DENIED with respect to his claim for damages.

IT IS SO ORDERED.

D.Kan.,2006.
Van Houten v. Gaskill
Not Reported in F.Supp.2d, 2006 WL 749410 (D.Kan.)