Howard v. Foster et al Doc. 20

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

REGINALD HOWARD,

Plaintiff(s),

v.

S. FOSTER, et al.,

Defendant(s).

2:13-CV-1368 JCM (NJK)

ORDER

Presently before the court is a motion to dismiss filed by defendants Gustavo Sanchez, Timothy Carlman, Dean Willett, Roger Tobar, Ira Hollingsworth, Joesph Lewis, Loren Chapulin, and Aaron Dicus ("defendants"). (Doc. # 15). *Pro se* plaintiff Reginald Howard ("plaintiff") filed a response in opposition (doc. # 18) and defendants filed a reply (doc. # 19).

I. Background

During all times relevant to this action, plaintiff was in the custody of the Nevada Department of Corrections ("NDOC") and incarcerated at Southern Desert Correctional Center ("SDCC"), where named defendants, with the exception of defendant Foster, were employed as correctional officers.

In his complaint, *pro se* plaintiff alleges several causes of action against defendants in their official and individual capacities for First, Eighth, and Fourteenth Amendment violations pursuant to 42 U.S.C. § 1983. (Doc. # 4). Plaintiff seeks declaratory, injunctive, and monetary relief. After the court's screening order, the following claims are at issue in the instant motion. (Doc. # 3).

James C. Mahan
U.S. District Judge

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Count one - claim (1) for retaliation against defendants Sanchez, Acala, and Stein and claim (2) for excessive use of force by defendant Sanchez. Plaintiff alleges that defendants trashed his cell and read his legal papers and subsequently, defendant Sanchez handcuffed him and squeezed the cuffs, re-injuring a nerve in his right hand. Plaintiff alleges that defendants' actions were in retaliation for grievances filed against them. (Doc. # 4).

Count two - claim (3) for unconstitutional conditions of confinement against defendants Carlman and Willett and claim (4) for retaliation against defendants Tobar and Hollingsworth. Plaintiff alleges that he was placed in disciplinary segregation for twenty-two days, during which defendants deprived him of a change of clothes and a towel, causing him to develop a rash on his legs. Plaintiff further alleges that defendants refused to deliver several items of plaintiff's property in retaliation for having filed grievances. (Doc. # 4).

Count three - claim (5) for retaliation by defendants Lewis, Bloomfield, and Christianson and claim (6) for excessive use of force by defendants Lewis and Christianson. Plaintiff alleges that after defendants searched his cell and confiscated his hot pot, he asked them for a property notice and grievance form. Plaintiff alleges that defendants later returned with the form and, in retaliation for having filed grievances against them, pushed him against the wall and forced him to hold the wall for thirty minutes. (Doc. # 4).

Count four - claim (7) for violations of procedural due process against defendants Carlman, Sanchez, Chapulin, Stein, and Acala. Plaintiff alleges that he did not receive notice of the charges against him twenty-four hours before his disciplinary hearing because he was not given his glasses and was unable to read them. Plaintiff further alleges that he was unable to present documents in his defense and did not receive his glasses until right before his hearing. (Doc. # 4).

In the instant motion, defendants request that the court dismiss claims (1)-(7), arguing that plaintiff cannot sustain an action under 42 U.S.C. § 1983. (Doc. # 15). The court will address each claim in turn.

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II. Legal Standard

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. 662, 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged–but not shown–that the pleader is entitled to relief." *Id.* (internal quotations omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the

opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

III. Analysis

As an initial matter, the court acknowledges that plaintiff's complaint was filed *pro se* and is therefore held to less stringent standards. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.") (internal quotations and citations omitted). However, "*pro se* litigants in an ordinary civil case should not be treated more favorably than parties with attorneys of record." *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

Title 42 U.S.C. § 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. "To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law." *Long v. Cnty. of L.A.,* 442 F.3d 1178, 1185 (9th Cir. 2006).

A. First Amendment Retaliation

In the prison context, First Amendment retaliation under § 1983 requires five elements: (1) a state actor took an adverse action against an inmate; (2) because of; (3) that prisoner's protected conduct, and that such action; (4) chilled the inmate's exercise of his First Amendment rights; and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). "[T]he mere threat of harm can be an adverse action . . . ." *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). Prisoners have a First Amendment right to file prison grievances against prison officials. *Brodheim*, 584 F.3d at 1269. Retaliation against a prisoner for exercising his right to file grievances is itself a constitutional violation. *Id*. The relevant inquiry is whether the prison "official's acts would chill or silence a person of ordinary firmness

from future First Amendment activities." *Rhodes*, 408 F.3d at 568. A plaintiff who fails to allege a chilling effect may still sufficiently state a claim if a harm is alleged that is more than minimal. *Id.* at n.11; *Brodheim*, 584 F.3d at 1269.

(I) Claim (1) - retaliation against defendants Sanchez, Acala, and Stein

Accepting all material factual allegations as true, the complaint sufficiently states a plausible claim for retaliation. Plaintiff alleges that defendants took his inmate grievance and used excessive force against him in retaliation for having filed grievances against them and having participated in investigations. Plaintiff further alleges that he suffered an injury to his hand and that his grievance was taken and never filed. Lastly, plaintiff alleges that defendants took his grievance before he finished filling it out, used excessive force in doing so, and never turned it in.

Defendants argue that defendant Sanchez restrained plaintiff in furtherance of ensuring the safety and security of the institution. They argue that plaintiff's grievance form was seized in an attempt to maintain order, not retaliate. Contrarily, the complaint alleges that plaintiff told defendants they were "going down on a civil rights violation" in response to their repeated attempts to seize his uncompleted grievance. (Doc. # 4, p. 7).

While the testimony of this claim is conflicting, it is inappropriate to weigh disputes of fact at this stage. Accordingly, the court finds that the complaint states sufficient allegations to support a plausible claim for relief and the motion to dismiss will be denied as to this claim.

(ii) Claim (4) - retaliation against defendants Tobar and Hollingsworth

This claim contains allegations that, while indicating a possibility of misconduct, do not rise to the level of plausibility to withstand a motion to dismiss. The complaint includes a conclusory statement that the delay in the return of plaintiff's property was retaliation without stating any facts to plausibly support it. Moreover, the complaint contains no allegations to show that the delay was not a necessary result of plaintiff being held in disciplinary segregation. Further, the complaint fails to allege that defendants' actions constituted chilling conduct or lacked a legitimate penological reason. Plaintiff merely alleges that the delay was retaliatory because all other inmates in segregation received their property within a shorter time span.

Accordingly, the court finds that plaintiff's conclusory allegations do not plausibly state a claim for retaliation and the motion to dismiss will be granted as to this claim.

(iii) Claim (5): retaliation against defendants Lewis, Bloomfield, and Christianson

The complaint merely recites the elements of retaliation without the support of sufficient factual allegations. Plaintiff simply alleges that defendants searched his cell and confiscated his hot pot in retaliation for having filed grievances against them. Plaintiff goes on to allege that, in retaliation for requesting a property notice and grievance form, defendants returned with the form and ordered him to hold the wall for thirty minutes. Plaintiff fails to plead any facts to support his contentions and fails to allege that his rights were chilled or that defendants' actions did not advance a legitimate penological goal.

Accordingly, the court finds that the complaint fails to allege sufficient facts to state a plausible claim of relief and the motion to dismiss will be granted as to this claim.

B. Eighth Amendment Excessive Force

The Eighth Amendment is violated when a prison official causes "the unnecessary and wanton infliction of pain." *Hudson v. McMillan*, 503 U.S. 1, 5 (1992). "[W]henever prison officials stand accused of using excessive physical force in violation of the [Eighth Amendment], the core inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 6-7. To determine whether the physical force used was unnecessary and wanton, the proper factors to consider include: (a) extent of injury suffered by an inmate; (b) need for application of force; (c) relationship between that need and the amount of force used; (d) threat reasonably perceived by the responsible officials; and (e) any efforts made to temper the severity of a forceful response. *Id.* at 7.

Moreover, when prison officials act in response to an immediate disciplinary need, the standard is "malicious and sadistic," instead of "deliberate indifference." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Courts must be deferential when reviewing the necessity of force because the use of force relates to prison officials' legitimate interest in maintaining security and order. *Id*. at 321-22.

Although serious injury does not need to be shown, the Eighth Amendment necessarily excludes from constitutional recognition *de minimis* uses of physical force. *Hudson,* 503 U.S. at 9-10.

(I) Claim (2) - excessive use of force by defendant Sanchez

The complaint plausibly alleges that defendant Sanchez intentionally injured plaintiff's hand so as to send a message to the other inmates not to file grievances. The complaint states that plaintiff was in his cell alone, sitting down, and filling out a grievance form when defendants Sanchez, Acala, and Stein arrived. Defendants do not deny that plaintiff immediately complied with defendants' orders to get up and put his hands on the wall. Plaintiff alleges that Sanchez handcuffed him and told him to "scream." (Doc. # 4, p. 7). Upon his refusal to do so, plaintiff asserts that Sanchez "squeezed" the cuff, resulting in the re-injury of his hand.

In support, plaintiff states that he was taken to the infirmary for treatment and was unable to use his hand normally for weeks. Additionally, plaintiff states that he previously submitted an affidavit regarding an incident in which Sanchez made a fellow inmate "scream" by trying to break his arm and Sanchez "wanted [plaintiff] to know [he] didn't appreciate that testimony." (Doc. # 4, p. 7).

Taking plaintiff's allegations as true, the complaint gives rise to a plausible inference that the "threat" plaintiff posed against the three correctional officers was no threat at all and Sanchez's action was intended to inflict harm. Defendants argue that placing plaintiff in handcuffs was in response to a verbal "threat" so as to maintain discipline and ensure the safety of inmates and prison officials. Defendants do not address or dispute plaintiff's allegations otherwise.

Accordingly, accepting the factual allegations as true, the court finds the complaint contains sufficient facts to plausibly state a claim for relief and the motion to dismiss will be denied as to this claim.

(ii) Claim (6) - excessive use of force by defendants Lewis and Christianson

The complaint fails to allege sufficient facts to support a plausible claim for excessive use of force by defendants Lewis and Christianson. The complaint alleges only that defendants "pushed"

plaintiff against the wall and ordered him to hold the wall for thirty minutes. The complaint fails to state any facts as to the amount of force, injury, or otherwise to support a claim.

Accordingly, the motion to dismiss will be granted as to this claim.

C. Eighth Amendment Unconstitutional Conditions of Confinement

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31 (1993). Prison officials must provide prisoners with "food, clothing, shelter, sanitation, medical care, and personal safety." *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986). To state a valid claim, a plaintiff must show that the conditions of confinement violated a human need, *id.,* and a prison official was deliberately indifferent to the unconstitutional conditions. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

Additionally, the amount of time an inmate was subjected to the conditions is relevant to the determination of whether the conditions violated a human need. *Hutto v. Finney*, 437 U.S. 687, 686-87 (1978). The standard for deliberate indifference is equivalent to recklessness in the civil sense, requiring that the defendant "[knew] of and disregarded an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 836. "The denial of adequate clothing can inflict pain under the Eighth Amendment." *Walker v. Sumner*, 14 F.3d 1415, 1421 (9th Cir. 1994).

(I) Claim (3) - unconstitutional conditions of confinement against defendants Carlman and Willett

The complaint fails to allege that the conditions of segregation violated a human need. Defendants correctly argue that the complaint fails to state facts as to what plaintiff *was* given in segregation and how such things were inadequate. The complaint alleges that plaintiff was subjected to twenty-two days in segregation without a change of clothes or a towel, causing him to develop a rash on his legs.

While it is understandable that plaintiff desired a change of clothes, failing to provide one does not rise to a constitutional deprivation of a human need. The complaint lacks any facts to support a plausible assertion that the conditions caused plaintiff's rash.

Accordingly, the court finds that the complaint fails to state a plausible claim for unconstitutional conditions of confinement and the motion to dismiss will be granted as to this claim.

D. Procedural Due Process

Procedural due process at a prison disciplinary hearing is satisfied if a prisoner receives: (1) a written notice of the charges in advance of the hearing; (2) a brief period of time, no less than twenty-four hours, to prepare for the hearing; (3) an impartial hearing body; (4) a written statement of the decision by the fact-finder regarding the facts relied upon and the reasons for the disciplinary action; (5) an opportunity to call witnesses and present documentary evidence; and (6) an opportunity to seek the aid of a fellow inmate or prison staff on complex matters. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). "[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board . . . ." *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985); *Burnsworth v. Gunderson*, 179 F.3d 771, 774-75 (9th Cir. 1999) (where there is no evidence of guilt, it may be unnecessary to demonstrate existence of a liberty interest); *but see Hines v. Gomez*, 108 F.3d 265, 268-69 (9th Cir. 1997) (holding that this standard does not apply to original rules violation report where prisoner alleges the report is false).

(I) Claim (7): procedural due process against defendants Carlman, Sanchez, Chapulin, Stein, and Acala

The complaint does not allege that defendants failed to provide written notice twenty-four hours before plaintiff's disciplinary hearing. Instead, plaintiff alleges that the requirements of *Wolff* were not satisfied because he was unable to read the charges without his glasses. Moreover, plaintiff admits that he received written notice more than twenty-four hours before his hearing. Plaintiff fails to allege facts to support that his understanding of the charges were affected in any way as a result of not having glasses.

Moreover, the complaint merely puts forward conclusory allegations that the charges were "bogus" and the testimony used was false. (Doc. # 4, p. 13). Failing to allege any violations relating to the process itself, plaintiff's contentions appear to be with the charges and outcome of the disciplinary hearing.

Therefore, the court finds that plaintiff fails to meet his burden to withstand dismissal and the motion to dismiss will be granted as to this claim.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion to dismiss filed by defendants Gustavo Sanchez, Timothy Carlman, Dean Willett, Roger Tobar, Ira Hollingsworth, Joesph Lewis, Loren Chapulin, and Aaron Dicus, (doc. # 15), be, and the same hereby is, GRANTED in part and DENIED in part.

IT IS FURTHER ORDERED that claims (3) through (7) are DISMISSED without prejudice.

DATED June 17, 2014.

UNITED STATES DISTRICT JUDGE