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United States District Court,
M.D. Pennsylvania.

Richard VIEUX, Plaintiff,
v.
Joseph SMITH, Warden, et al., Defendants.
Civil No. 4:07-CV-299.

|
June 5, 2007.

Attorneys and Law Firms

Richard Vieux, USP-Lewisburg, Lewisburg, PA, pro se.

MEMORANDUM

JOHN E. JONES, III, United States District Judge.

THE BACKGROUND OF THIS MEMORANDUM IS AS FOLLOWS:

*1 Pending before this Court is a Report (doc. 8) issued by Magistrate Judge Thomas M. Blewitt ("the Magistrate Judge" or "Magistrate Judge Blewitt"), on April 2, 2007, that recommends: 1) Plaintiff Richard Vieux's action be dismissed for failure to state a claim; and 2) Plaintiff's Motion for Temporary/Permanent Injunction ("the Motion") (doc. 2), filed on February 15, 2007, be dismissed as moot. For the reasons that follow, we will adopt the learned Magistrate Judge's Report in its entirety and dismiss Plaintiff's Motion as moot.

*PROCEDURAL HISTORY:*

On or about February 15, 2007, Plaintiff Richard Vieux ("Plaintiff or "Vieux") filed this *pro se Bivens* action in the United States District Court for the Middle District of Pennsylvania.[1] Plaintiff named as Defendants three (3) specific individuals employed by the Bureau of Prisons ("BOP") at the United States Penitentiary at Lewisburg ("USP-Lewisburg"),[2] as well as unknown John Doe Defendants. (Rec.Doc.1). On February 15, 2007, Plaintiff filed the instant Motion. (Rec.Doc.2).

Pursuant to the screening procedure required by 28 U.S.C. § 1915A for Complaints filed by inmates such as Plaintiff, and after review of Plaintiff's Complaint, on April 2, 2007, Magistrate Judge Blewitt issued a Report recommending: 1) Plaintiff's claims be dismissed for failure to state a claim; and 2) Plaintiff's Motion (doc. 2) be dismissed as moot. (Rec.Doc.8). On April 16, 2007, Plaintiff filed his Objections to Magistrate Judge Blewitt's Report, and his supporting brief. (Rec.Docs.9-10). Thus, this matter is ripe for disposition.

*STANDARD OF REVIEW:*

When objections are filed to a report of a magistrate judge, we make a *de novo* determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. *See United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *see also* 28 U.S.C. § 636(b)(l); Local Rule 72.31. Furthermore, district judges have wide discretion as to how they treat recommendations of a magistrate judge. *See id.* Indeed, in providing for a *de novo* review determination rather than a *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound discretion, chooses to place on a magistrate judge's proposed findings and recommendations. *See id., see also Mathews v. Weber,* 423 U.S. 261, 275, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976); *Goney v. Clark,* 749 F.2d 5, 7 (3d Cir.1984).

*FACTUAL BACKGROUND:*

In his Report and Recommendation ("Report"), Magistrate Judge Blewitt summarizes the relevant factual background of the instant action based on his reading of the parties' submissions. (Rec.Doc.8). Although we agree with the Magistrate Judge's factual summary, taken in large part from Plaintiff's Complaint (doc. 1), we will review briefly the most pertinent portions thereof.[3]

On December 7, 2003, an Incident Report was issued charging Plaintiff with attempting to bring contraband, namely unauthorized eyeglasses, into USP-Lewisburg's visiting room. Plaintiff admitted the violation, and as a result, on December 14, 2003, an Administrative Detention Order issued detailing: 1) the Incident Report; 2) the decision to find Plaintiff guilty; and 3) the sanctions to be imposed upon Plaintiff.

*2 In June 2004, Plaintiff's name was submitted by Defendant Hoekman for security clearance to become a photographer in USP-Lewisburg's visiting room. On July 8, 2004, a security clearance memorandum regarding Plaintiff's photographer work assignment was approved. Thus, on July 14, 2004,

  

Plaintiff began his work detail as a visiting room photographer.

In February 2005, after working as a visiting room photographer for eight (8) months, Defendant Eddenger advised Plaintiff that he was losing said work detail because of his 2003 Incident Report Conviction. Plaintiff was also advised that the decision was made by Defendant Smith.

Plaintiff claims that he attempted to speak with his supervisor, Defendant Hoekman, and Defendant Smith regarding his removal from the visiting room photographer work detail in February 2005, but Defendant Hoekman was not available. Subsequently, on March 5, 2005, Plaintiff discussed his 2003 Incident Report Conviction with Defendants Hoekman and Smith. Plaintiff was told by Defendant Smith that he would not get said work detail back due to the 2003 Incident Report Conviction.

Plaintiff further contends that he performed well his work detail during the approximately eight (8) months between his commencement thereof and Defendants' removal of him therefrom. Plaintiff also claims that he had a legitimate expectation to be allowed to continue his work assignment, and that his arbitrary removal from such by the Warden violated his due process and equal protection rights.[4]

Thus, as alluded to above, in the instant action, Plaintiff asserts two (2) types of claims: Count I alleges Due Process claims, and Count II alleges Equal Protection claims. (Rec.Doc.1). With respect to Count I, Plaintiff claims that Defendants arbitrarily removed him from his photographer work assignment despite him being approved for it, and given security clearance, while still under sanctions for the 2003 Incident Report Conviction. Plaintiff further claims that he had a reasonable and legitimate expectation of continued participation in the photographer job in the visiting room, and that he was punished a second time by Defendants for the 2003 Incident Report Conviction when he was removed from his photographer job. With respect to Count II, Plaintiff claims that Defendants violated his equal protection rights "when they arbitrarily and capriciously removed Plaintiff from his legitimate entitlement of continual participation in the visiting room work detail." (Rec.Doc.1).

Accordingly, in his Complaint, Plaintiff seeks compensatory damages in the amount of $800 against each Defendant with respect to Count I and $500 against each Defendant with respect to Count II. (Rec.Doc.1). Plaintiff also seeks punitive damages in the amount of $8,500 against each Defendant.[5] (Rec.Doc.1).

Simultaneous with his filing of the Complaint, Plaintiff also filed the instant Motion (doc. 2) seeking an Order from this Court enjoining, until this action is resolved, Defendants from transferring him to another prison as retaliation for his filing his civil rights action.

*DISCUSSION:*

*3 Plaintiff objects to the Magistrate Judge's recommendations that Plaintiff's due process and equal protection claims be dismissed. (Rec.Doc.10). Further, Plaintiff objects to the Magistrate Judge's recommendation that Plaintiff's Motion (doc.2) be dismissed as moot. In his support of said Objections, Plaintiff argues that the Magistrate Judge misapprehended the nature and circumstances of the events that led to these proceedings. (Rec.Doc.9). Thus, Plaintiff essentially argues that Defendants created circumstances that deprived Plaintiff of his Constitutional rights. (Rec.Doc.10). We will consider in turn the learned Magistrate Judge's recommendations, as well as Plaintiff's Objections, regarding Plaintiff's claims.

A. Plaintiffs Due Process Claims

In Count I, Plaintiff alleges that his Due Process rights were violated by Defendants when they arbitrarily removed him from his job as a photographer in USP-Lewisburg's visiting room without just cause, and without charging him with any BOP violation. Plaintiff claims that he had a "legitimate entitlement of continual participation in the visiting room work detail," and that the deprivation of his job is a violation of his liberty and property interests under the Due Process Clause of the Fifth Amendment. (Rec .Doc. 1).

We find Plaintiff's arguments unavailing for several reasons. First, an inmate's assignment to a work detail does not implicate either a liberty or a property interest. Indeed, an inmate has no recognizable Constitutional right to a particular prison job.[6] *See* *Wright v. O'Hara,* 2002 WL 1870479, at *5 (E.D.Pa.2002) (' "We do not believe that an inmate's expectation of keeping a particular prison job amounts to either a property or liberty interest entitled to protection under the due process clause.' " (internal citations omitted)) (quoting *Bryan v. Werner,* 516 F.2d 233, 240 (3d Cir.1975)). Moreover, "it is uniformly well established throughout the federal circuits that an inmate's expectation of keeping a specific prison job, or any job, does not implicate a property interest." *See* *Cummings v. Banner,* 1991 WL 238140, at *5 (E.D.Pa.1991) (citing *James v. Quinlan,* 866 F.2d 627, 630 (3d Cir.1989); *Brian v. Werner,* 516 F.2d 233, 240 (3d Cir.1975); *Gibson v. McEvers,* 631 F.2d 95, 98 (7th

Cir.1980)). Thus, Plaintiff's removal from his visiting room photographer work detail based on his conviction for a prior incident in which he introduced contraband into the visiting room does not implicate any protected Constitutional right.

Second, BOP policy neither affords a property or liberty interest to Plaintiff nor confers any Constitutional right to any inmate. Recently the Third Circuit clearly stated that "agency interpretative guidelines do not give rise to the level of a regulation and do not have the effect of law." *Mercy Catholic Med. Ctr. v. Thompson,* 380 F.3d 142, 154 (3d Cir.2004). Thus, despite Plaintiff's alleged compliance with BOP rules during the eight (8) months that he was the photographer in USP-Lewisburg's visiting room, BOP policy can not and does not confer a Constitutional right upon Plaintiff.

*4 Third, affording relief to Plaintiff based upon the instant action would essentially require this Court to find that Plaintiff was not a security risk while working as visiting room photographer, and we simply are not willing to do so. Courts give significant deference to the judgments of prison officials regarding prison regulations and administration, and generally do not interfere with prison administration matters, such as a prison's decision to place or not to place a plaintiff in a particular prison job. *See Fraise v. Terhune,* 283 F.3d 506, 515 (3d Cir.2002). Here, we find deference to USP-Lewisburg's decision to terminate Plaintiff's employment as a visiting room photographer particularly warranted given Plaintiff's previous conviction for trying to bring contraband into the visiting room.

Accordingly, we accept that portion of the Magistrate Judge's Report that recommends dismissal of the Due Process claims as against all Defendants, including the unnamed John Doe Defendant(s).[7]

B. Plaintiffs Equal Protection Claims

In Count II, Plaintiff alleges that his equal protection rights were violated by Defendants "when they arbitrarily and capriciously removed Plaintiff from his legitimate entitlement of continual participation in the visiting room work detail" as photographer. (Rec.Doc.1). Plaintiff alleges that Defendants violated the Equal Protection Clause because they approved him for said job despite his 2003 Incident Report Conviction. (Rec.Doc.8).

Once again, we find Plaintiff's arguments unpersuasive. As Magistrate Judge Blewitt notes, the elements of Equal Protection claims require plaintiffs to state that defendants intended to discriminate against them, and later prove this by either direct or circumstantial evidence. *See Pennsylvania v. Flaherty,* 983 F.2d 1267 (3d Cir.1993); *Williams v. Pennsylvania State Police,* 108 F.Supp.2d 460, 471 (E.D.Pa.2000). Here, Plaintiff has not alleged that Defendants treated him differently than other similarly situated inmates based on his race, gender, or nationality. (*See* Rec. Doc. 1). Further, Plaintiff has not alleged that Defendants were motivated by a discriminatory intent with respect to Plaintiff's allegations. Indeed, Plaintiff himself states his removal was due to the 2003 Incident Report Conviction, and not because of race, gender, or nationality. (Rec.Doc.1). Thus, Plaintiff has not alleged any facts from which it can be concluded that Defendants engaged in intentional or purposeful discrimination, or that Plaintiff was treated any differently by Defendants than similarly situated persons on the basis of race, gender, or nationality. Therefore, Plaintiff does not state cognizable Equal Protection claims.

Accordingly, we accept that portion of the Magistrate Judge's Report that recommends dismissal of the Equal Protection claims as against all Defendants, including the unnamed John Doe Defendant(s).[8]

In conclusion, we will adopt the Magistrate Judge's Report in its entirety, and dismiss the instant action.[9] In addition, because Plaintiff cannot show any likelihood of success on the merits of either of his claims, we will also dismiss Plaintiff's Motion (doc. 2) as moot.

*5 An appropriate Order shall issue.

REPORT AND RECOMMENDATION

THOMAS M. BLEWITT, United States Magistrate Judge.

I. Background.

The Plaintiff, Richard Vieux, an inmate at the United States Penitentiary at Lewisburg ("USPLewisburg"), Lewisburg, Pennsylvania, filed, *pro se,* this *Bivens*[1] action pursuant to 28 U.S.C. § 1331, on February 15, 2007. Plaintiff names as Defendants with respect to his *Bivens* action three (3) individuals employed by the Federal Bureau of Prisons ("BOP") at USP-Lewisburg, namely Warden Joseph Smith, Ray Hoekeman, Special Investigator Administrator, and Matthew Eddenger, Special Investigation Supervisor. Plaintiff

also names unknown John Doe Defendants. (Doc. 1, pp. 1-3). Plaintiff sues all Defendants in their individual capacities. (*Id.,* p. 3, ¶ 7.). Plaintiff has paid the filing fee. (Docs. 6 & 7).

Plaintiff claims that the individual Defendants violated his due process and equal protection rights when they arbitrarily discontinued his participation in his legitimate entitlement to a prison work assignment as a photographer with the visiting room work detail to take photos of inmates and their visitors. (*Id.,* p. 2).

II. Allegations of Complaint.

Specifically, Plaintiff alleges that in June 2004, while he was still under sanctions from a December 2003 incident report for which he was convicted of attempting to have unauthorized eyeglasses brought into the prison's visitation room, which violation he admits he committed, his name was submitted by Defendant Hoekman for security clearance to become a photographer in the prison's visiting room. Plaintiff's Exhibit A attached to his pleading is a copy of the Administrative Detention Order dated December 14, 2003 issued as a result of the incident report charging Plaintiff with attempting to bring in contraband to the visiting room and the December 7, 2003 Incident Report. Exhibit B is a copy of the DHO's Report regarding the stated incident report and decision finding him guilty and sanctioning him. Plaintiff states that the security clearance memo, with respect to his photographer work assignment, was approved in July 2004. Plaintiff attaches to his Complaint as Exhibit C a copy of the July 8, 2004 Memo approved by Defendant Hoekman. Plaintiff then received photography training, as well as security clearance, and began his visiting room photographer work detail on July 14, 2004. (*Id.,* pp. 3-5). Plaintiff states that he was later allowed to also become a photographer for the general population, and that he then became the lead photographer. (*Id.*).

After about eight months (July 2004-February 2005), Plaintiff avers that Defendant Eddenger advised him that he was losing his photographer job with the visitation work detail because of Defendant Warden Smith's decision, which was based on Plaintiff's 2003 incident report conviction. (*Id.,* p. 5). Plaintiff states that he was already sanctioned for the 2003 incident report, which he admittedly committed. Plaintiff concedes that his due process rights were afforded to him with respect to the 2003 incident report and conviction. Plaintiff states that, despite still being on sanctions for the 2003 incident report, he was nonetheless cleared for the visiting room photographer job. (*Id.,* pp. 3-5). Plaintiff states that he tried to speak with his supervisor, Defendant Hoekman, and Warden Smith about his removal from the photographer job in February 2005, but Hoekman was not available. (*Id.,* p. 5).

Plaintiff avers that on March 2, 2005, he went back to speak with Defendant Smith and Defendant Hoekman, and his 2003 Incident Report was discussed. Defendant Smith told Plaintiff that he would never get the photography work detail back due to the 2003 incident. (*Id.,* p. 6, ¶ 21.). Plaintiff claims that his due process and equal protection rights were violated by Defendants for removing him from the photographer job.

*6 Plaintiff states that he exhausted his BOP Administrative remedies with respect to his present claim. (*Id.,* pp. 6-7). Plaintiff's Exhibit D consists of copies of his Administrative remedy request and responses from the BOP.

Plaintiff asserts two claims, Count I for Due Process violations, and Count II for Equal Protection violations. With respect to Count I, Plaintiff avers that Defendants arbitrarily removed him from his photographer work assignment even though he was approved for it and given security clearance despite being on sanctions for the 2003 Incident Report conviction. (*Id.,* p. 8). Plaintiff avers that he had a reasonable and legitimate expectation of continued participation in the photographer job in the visiting room, especially since he was promoted due to his good performance for 8 months. Plaintiff claims that he was punished again by Defendants for the 2003 Incident Report when they removed him from the photographer job. (*Id.,* pp. 8-9). Plaintiff claims that this amounted to disciplinary action that was arbitrary and capricious.

In Count II, Plaintiff claims that Defendants violated his equal protection rights "when they arbitrarily and capriciously removed Plaintiff from his legitimate entitlement of continual participation in the visiting room work detail." (*Id.,* p. 10, ¶ 35.). Plaintiff also states:

In other words, the approval and authorization by the Defendants for Plaintiff to work in the visiting room when they known (sic) or should have known about the 2003 Incident and or Plaintiff being on sanctions at the time of the approval and authorization is substantive evidence of the manufactured "security issue: and thus being partial and inconsistent (arbitrary and capricious), that is, violating Plaintiff's Equal Protection rights as prescribed under the Federal Constitution.

(*Id.,* ¶ 36.).

As relief, Plaintiff seeks compensatory damages in the amount of $800 against each Defendant with respect to Count I and $500 against each Defendant with respect to Count II. (*Id.,* p.

11). Plaintiff also seeks punitive damages of $8,500 against each Defendant. Plaintiff's relief requests for specific amounts of monetary damages should be stricken from the Complaint. Since Plaintiff seeks unliquidated damages, he cannot claim a specific sum of relief. Pursuant to Local Rule 8.1, M.D. Pa., Plaintiff's requests for specific monetary damages (Doc. 1, p. 1, ¶ 's 39.-40.) should be stricken from his Complaint. *See Stuckey v. Ross,* Civil No. 05-2354, M.D. Pa., 1-9-06 Order, J. McClure.

Plaintiff has also filed a Motion for Temporary/Permanent Injunction seeking the Court to enjoin Defendants from transferring him to anther prison as retaliation for his filing his civil rights action, until his case is resolved. (Doc. 2). In his Injunction Motion, Plaintiff avers, without any substantiation, that Defendants will try to win this case "by any means necessary" and "will strive to transfer Plaintiff to another federal facility to deprive Plaintiff of the benefits of being in this Court's jurisdiction...." (Doc. 2, p. 6).

*7 In July 2004, Plaintiff states that he commenced performing his work assignment in the visiting room as photographer and that he continued to do this job well for about 8 months until Defendants arbitrarily decided to remove him form this job. Plaintiff claims that he had a legitimate expectation to be allowed to continue to have his work assignment and that his arbitrary removal by the Warden of his prison work detail violated his due process and equal protection rights. Plaintiff also states that he exhausted his administrative remedies regarding his present claims and his exhibits indicated that he received a final denial from the Bureau of Prisons ("BOP") on August 31, 2005. (Doc. 1, Ex. D last page).[2]

This case is construed as a Fifth Amendment due process claim of arbitrary removal from prison job without justification, and an Equal Protection claim for arbitrarily removing Plaintiff from his prison job and depriving him of his legitimate entitlement of continued participation in the photographer job in the visiting room. Plaintiff also claims that Defendants manufactured a security issue when they knew about the 2003 incident report and cleared him for the job. (Doc. 1, p. 10).

III. PLRA.

Notwithstanding Plaintiff's payment of the filing fee, the Prison Litigation Reform Act of 1995 (the "PLRA")[3] obligates the Court to engage in a screening process.[4] Specifically, even though Plaintiff paid the filing fee for a civil rights action, we must still screen his complaint pursuant to 28 U.S.C. § 1915A. *See Vega v. Kyler,* C.A. No. 03-1936 (3d Cir.2004) 2004 WL 229073 (Nonprecedential) (If prisoner pays filing fee, civil rights complaint is subject to review under 28 U.S.C. § 1915A(b) and not 28 U.S.C. § 1915(e)(2)(B)).

Section 1915A provides:

(a) Screening.-The court shall review, before docketing if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.-On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief against a defendant who is immune from such relief.

In reviewing the complaint under 28 U.S.C. § 1915A(b), we have determined that the Plaintiff does not state the personal involvement of any John Doe Defendant with respect to either of his claims. We also find that Plaintiff's due process claim regarding his removal from his photographer job without any basis as against all Defendants should be dismissed since Plaintiff has not implicated a property or liberty interest with respect to his prison job. Thus, we find that Plaintiff's *Bivens* action, based on the face of his pleading, fails to state a Fifth Amendment claim. We find that Plaintiff has failed to state an equal protection claim as well. We also find that under § 1915A(b)(2), the Plaintiff cannot proceed as against the John Doe Defendants since such Defendants cannot be served, and since there is no personal involvement in Plaintiff's removal from his prison job alleged with respect to any unnamed Defendant or Defendants. Thus, we shall recommend that the John Doe Defendant(s) be dismissed. Further, we find no personal involvement of any Defendants is alleged with respect to Plaintiff's speculative Injunction Motion and his retaliatory transfer claim. We also find that Plaintiff has failed to state any constitutional claim and that he cannot show likelihood of success on the merits of his claims. Therefore, we shall recommend that Plaintiff's Injunction Motion be dismissed as moot. (Doc. 2).

IV. Motion to Dismiss Standard.

*8 In considering whether a pleading states an actionable claim, the court must accept all material allegations of the complaint as true and construe all inferences in the light most favorable to the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A complaint should not be dismissed for failure to state a claim unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 44-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Ransom v. Marrazzo,* 848 F.2d 398, 401 (3d Cir.1988). A complaint that sets out facts which affirmatively demonstrate that the plaintiff has no right to recover is properly dismissed without leave to amend. *Estelle v. Gamble,* 429 U.S. 97, 107-108, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

V. *Bivens.*

Under *Bivens,* the District Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 to entertain an action brought to redress alleged federal constitutional or statutory violations by a federal actor under *Bivens, supra.* Pursuant to *Bivens,* "a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district court to obtain an award of monetary damages against the responsible federal official." *Butz v. Economou,* 438 U.S. 478, 504, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). A *Bivens*-style civil rights claim is the federal equivalent of an action brought pursuant to 42 U.S.C. § 1983 and the same legal principles have been held to apply. *See, Paton v. LaPrade,* 524 F.2d 862, 871 (3d Cir.1975); *Veteto v. Miller,* 829 F.Supp. 1486, 1492 (M.D.Pa.1992); *Young v. Keohane,* 809 F.Supp. 1185, 1200 n. 16 (M.D.Pa.1992). In order to state an actionable *Bivens* claim, a plaintiff must allege that a person has deprived him of a federal right, and that the person who caused the deprivation acted under color of federal law. *See West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Young v. Keohane,* 809 F.Supp. 1185, 1199 (M.D.Pa.1992).

VI. Discussion.

*1. Fifth Amendment Due Process Claim*

As discussed, Plaintiff alleges that the individual Defendants arbitrarily removed him from his prison job as a photographer without any just cause or without charging him with any BOP violation. Plaintiff also indicated that he was approved for the visitation work detail as a photographer and that Defendant Eddenger informed Plaintiff of this and agreed to place him in this position despite still being under sanctions with respect to his 2003 incident report conviction. Plaintiff states that this Defendant told him not to "screw him over" after he was approved for the prison job. (Doc. 1, pp. 4-5, ¶ 15.). Plaintiff claims that Defendants placed him in the visitation work detail as a photographer and were aware of his 2003 incident report conviction, and that after about 8 months of successfully performing the job and after promotion to lead photographer, they removed him from this position without a hearing and without just cause.

*9 Plaintiff indicates that after he met with Defendants Smith and Hoekman about his removal, the Warden told him he would never get the work detail back due to the 2003 incident. (*Id.,* pp. 5-6).

Plaintiff fails to implicate any property interest or liberty interest with respect to his claim that the Defendants arbitrarily removed him from his job with the visitation detail as a photographer even though he claims it was a second sanction for the 2003 incident report. Plaintiff claims that Defendants could not simply remove him from the photographer job as a result of a prior incident for which he had been convicted and sanctioned, and of which Defendants were aware when they approved him for the work detail. Plaintiff claims that Defendants violated his due process rights by removing him from his photographer job following his 8-month successful participation in the work detail due to the December 2003 incident for which he had already been sanctioned. Plaintiff states that after being advised of his removal he met with the Warden and Defendant Hoekman regarding the authorization for his removal, and he was told by the Warden that he would never get the job detail back due to the 2003 incident. (*Id.,* p. 6). Plaintiff seems to claim that he could not have been removed from his prison job without charging him with an offense and without giving him any hearings. The Plaintiff states that the Defendants violated his rights by arbitrarily causing him to lose his prison job. An inmate's assignment to a work detail, does not implicate a liberty interest.

The Plaintiff has not alleged that he had a "protected liberty interest" that was infringed by the Defendants' actions. "[T]hese interests will generally be limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to the Due Process Clause of its own force ..., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."*Sandin v. Conner,* 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). "[T]he baseline for determining what is 'atypical and significant'-the 'ordinary incidents of prison life'-is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his conviction in accordance with due process of law." *Griffin v. Vaughan,* 112 F.3d 703, 706 (3d Cir.1997) *quoting* *Sandin,* 515 U.S. at 486. In *Griffin,* the Court found that confinement

of a prisoner in restrictive housing for fifteen (15) months did not implicate a constitutionally protected liberty interest.

Based on *Sandin* and *Griffin,* the Plaintiff's Complaint as against Defendants fails to state a claim, since the removal of Plaintiff from his visiting room photographer job, which was based on his conviction from a prior incident report in which he was convicted of introducing contraband in the visiting room, did not give rise to a protected liberty interest. Further, no liberty interest is implicated by the Plaintiff because he had no right to a particular prison job. It is well-settled that an inmate has no recognizable constitutional right to a particular prison job. *See* *Wright v. O'Hara,* 2002 WL 1870479, *5 (E.D.Pa.).

*10 We also find that the Plaintiff is requesting relief in the form of Court intervention and management while he is in prison, *i.e.* a finding that Plaintiff was not a security risk for being the visiting room photographer when he was previously convicted of an incident in which he tried to bring contraband into the visiting room. The Court will not generally interfere with prison administration matters such as the prison's decision to place or not to place Plaintiff in a particular prison job. The Court should give significant deference to judgments of prison officials regarding prison regulations and prison administration. *See* *Fraise v. Terhune,* 283 F.3d 506 (3d Cir.2002).

The Plaintiff avers that the Defendants' conduct caused him to be removed from his prison job without cause and to lose his position as photographer with the visitation work detail.

Plaintiff states that deprivation of his prison photographer job is a violation of his liberty and property interests under the due process clause of the Fifth Amendment. As mentioned, Plaintiff avers that he had a "legitimate entitlement of continual participation in the visiting room work detail." (*Id.,* p. 10, ¶ 35.). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." *Quinlan v. James,* 866 F.2d 627, 630 (3d Cir.1989)(quoting *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Property interests are not created by the Constitution. "Rather, they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Plaintiff argues that the BOP Policy mandates that staff take disciplinary action against inmates at such time and degree to regulate inmate's behavior. However, he states that disciplinary action may not be arbitrary and capricious. (*Id.,* pp. 8-9).

We find the BOP policy does not provide a property interest to Plaintiff and does not confer any constitutional right to an inmate.[5]

A policy manual does not have the force of law and does not rise to the level of a regulation. *Mercy Catholic Med. Ctr. v. Thompson,* 380 F.3d 142, 154 (3d Cir.2004). Recently, the Third Circuit clearly stated "that the agency interpretive guidelines do not give rise to the level of a regulation and do not have the effect of law." *Id.* Further, a violation of an internal policy does not automatically rise to the level of a Constitutional violation. *Whitcraft v. Township of Cherry Hill,* 974 F.Supp. 392, 398 (D.N.J.1996)(citing *Daniels v. Williams,* 474 U.S. 327, 332-33, 106 S.Ct. 662, 665-66, 88 L.Ed.2d 662 (1986); *Edwards v. Baer,* 863 F.2d 606, 608 (8th Cir.1988); *Jones v. Chieffo,* 833 F.Supp. 498, 505-506 (E.D.Pa.1993)).

*11 Plaintiff states that he followed all BOP rules while he was on the work assignment and that he was promoted due to his performance. Thus, Plaintiff states that he was "given the reasonable and legitimate entitlement (expectation) of continual participation...." (*Id.,* p. 8). We find the BOP policy does not afford an inmate Constitutional rights. Plaintiff's contention that the BOP policy creates a property interest is unfounded. The Plaintiff has no constitutional right to a prison job. *See* *Padilla v. Beard,* 2006 WL 1410079 (M.D.Pa.).

With respect to Plaintiff's claim that he is being deprived of a prison job by being removed arbitrarily due to his 2003 incident report conviction, of which Defendants were aware and nonetheless approved him to obtain the job, he has failed to claim a deprivation of a protected property interest. As the Court in *Cummings v. Banner,* 1991 WL 238140 *5, E.D.Pa.1991, stated:

> It is uniformly well established throughout the federal circuits that an inmate's expectation of keeping a specific prison job, or any job, does not implicate a property interest under the fourteenth amendment. *James v. Quinlan,* 866 F.2d 627, 630 (3d Cir.1989). *See also* *Brian v. Werner,* 516 F.2d 233, 240 (3d Cir.1975) (inmates expectation of keeping job is not a property interest entitled to due process protection); *Gibson v. McEvers,* 631 F.2d 95,

98 (7th Cir.1980) (prisoner's expectation of keeping prison job does not amount to a property interest entitled to due process protection); *Adams v. James,* 784 F.2d 1077, 1079 (11th Cir.1986) (assignment to job as law clerk does not invest inmate with a property interest in continuation as such); *Ingram v. Papalia,* 804 F.2d 595, 596 (10th Cir.1986) (Constitution does not create a property interest in prison employment); *Coakley v. Murphy,* 884 F.2d 1218, 1221 (9th Cir.1989) (no constitutional right to continuation in work release program to implicate property interest under fourteenth amendment); *Flittie v. Solem,* 827 F.2d 276, 279 (8th Cir.1987) (inmates have no constitutional right to be assigned a particular job).

Therefore, the Plaintiff's claim that the decision to remove him from the photographer job due to his 2003 incident report conviction and the decision that he was ineligible for the prison job, violated his Constitutional rights, should be dismissed as to all Defendants. *See Burns v. Pa DOC,* 2007 WL 442386, * 3 (E.D.Pa.), citing *Wright v. O'Hara,* 2002 WL 1870479, *5 (E.D.Pa.)("no liberty or property interest in prison job"); *Wilkins v. Bittenbender,* 2006 WL 860140, *9 (M.D.Pa.)("An inmate does not have a protected liberty or property interest in continued prison employment.").

This Court in *Wilkins* also stated:

Furthermore, although *Sandin* "did not instruct on the correct methodology for determining when prison regulations create a protected property interest [,]" as opposed to a liberty interest, the "law is well established ... that an inmate's expectation of keeping a specific prison job, or any job, does not implicate a protected property interest." *Bulger v. United States Bureau of Prisons,* 65 F.3d 48, 50 (5th Cir.1995). *See also Coakley v. Murphy,* 884 F.2d 1218, 1221 (9th Cir.1989) (holding inmates have no property interest in continuing in work-release program); *Ingram v. Papalia,* 804 F.2d 595, 596 (10th Cir.1986)

*12 (finding Constitution does not create a property interest in prison employment). *Wilkins,* supra., * 9.

*2. Equal Protection Claim*

Plaintiff alleges in Count II that his equal protection rights were violated by Defendants "when they arbitrarily and capriciously removed Plaintiff from his legitimate entitlement of continual participation in the visiting room work detail" as photographer. Plaintiff alleges that Defendants violated the equal protection clause because they approved him for the stated job even though they knew about his 2003 incident report conviction and his being on sanctions at the time of his approval. Plaintiff claims that this shows Defendants manufactured a security issue just to arbitrarily remove him from the job. (*Id.,* p. 10, ¶ 36.). Plaintiff does not claim that Defendants treated him differently than other similarly situated inmates based on his race, gender, or nationality.

Plaintiff asserts that his right to equal protection was violated by Defendants since they approved of his work detail when they knew of the 2003 incident report, but then arbitrarily removed him from this position claiming a security concern with respect to the already known incident report. Specifically, Plaintiff does not claim that he was being treated differently than other similar inmates. Plaintiff does not aver that Defendants treated him differently than similarly situated inmates based on his race, gender, or nationality.

We find that the Plaintiff's Equal Protection claim against Defendants should not proceed because the Plaintiff has not alleged that Defendants purposely discriminated against him on the basis of his race, gender, or nationality. Plaintiff does not claim that Defendants were motivated by a discriminatory intent with respect to Plaintiff's allegations. In fact, Plaintiff does not allege that he was removed from the photographer job because of his race or nationality. Rather, he states that his was removed due to the 2003 incident report and alleged security concerns. Such claims do not allege any form of racial discrimination by Defendants. Plaintiff fails to claim a discriminatory motive for Defendants' alleged conduct. Additionally, we find that Plaintiff has not properly stated that he and other inmates were similarly situated for purposes of an equal protection claim.

In the case of *Jefferson v. Wolfe,* 2006 WL 1947721, * 15 (W.D.Pa.), the Court stated:

> "as a threshold matter, in order to establish an equal protection violation, the plaintiff must ' ... demonstrate that [he has] been treated differently by a state actor than others who are similarly situated simply because [he] belongs to a particular protected class.' " (*Citing Keevan v. Smith,* 100 F.3d 644, 648 (8th Cir.1996).

The elements of an Equal Protection claim require Plaintiff to state Defendants intended to discriminate against him, and later to prove this by either direct or circumstantial evidence. *See Pa. v. Flaherty,* 983 F.2d 1267 (3d Cir.1993) (Intent is a *prima facie* element of a § 1983 equal protection claim of discrimination) (citing *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). *See also Williams v. Pa. State Police,* 108 F.Supp.2d 460, 471 (E.D.Pa.2000) ("to prevail on a § 1983 claim, a plaintiff must prove that the Defendant intended to discriminate") (citation omitted).

*13 The Equal Protection Clause does not require that all persons be treated alike, but instead, a plaintiff must show that the differential treatment to those similarly situated was unreasonable, or involved a fundamental interest or individual discrimination. *Tigner v. Texas,* 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124 (1940); *Price v. Cohen,* 715 F.2d 87, 91 (3d Cir.1983), *cert. denied,* 465 U.S. 1032, 104 S.Ct. 1300, 79 L.Ed.2d 700 (1984). It is well-settled that a litigant, in order to establish a viable equal protection claim, must show an intentional or purposeful discrimination. *Snowden v. Hughes,* 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Wilson v. Schillinger,* 761 F.2d 921, 929 (3d Cir.1985), *cert. denied,* 475 U.S. 1096, 106 S.Ct. 1494, 89 L.Ed.2d 895 (1986); *E & T Realty v. Strickland,* 830 F.2d 1107, 1113-14 (11th Cir.1987), *cert. denied* 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988). This "state of mind" requirement applies equally to claims involving (1) discrimination on the basis of race, religion, gender, alienage or national origin, (2) the violation of fundamental rights, and (3) classifications based on social or economic factors. *See, e.g., Britton v. City of Erie,* 933 F.Supp. 1261, 1266 (W.D.Pa.1995), *aff'd,* 100 F.3d 946 (3d Cir.1996); *Adams v. McAllister,* 798 F.Supp. 242, 245 (M.D.Pa.), *aff'd.* 972 F.2d 1330 (3d Cir.1992).

As the Court in *Barnes Foundation v. Township of Lower Merion,* 942 F.Supp. 970, 983 (E.D.Pa.1997), stated:

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Equal Protection Clause announces the "fundamental principle" that "the State must govern impartially," *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 587, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979), and "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

As the *Wilkins* Court stated:

A litigant seeking to establish a viable equal protection claim must show an intentional or purposeful discrimination. *Wilson v. Schillinger,* 761 F.2d 921, 929 (3d Cir.1985), *cert. denied,* 475 U.S. 1096, 106 S.Ct. 1494, 89 L.Ed.2d 895 (1986). However, the Equal Protection Clause "does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). The Court of Appeals for the Third Circuit has observed that d that all persons be treated alike but, rather, 'a direction that all persons similarly situated should be treated alike." ' *Artway v. Attorney Gen.,* 81 F.3d 1235, 1267 (3d Cir.1996) (quoting *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)); *see also Kuhar v. Greensburg-Salem Sch. Dist.,* 616 F.2d 676, 677 n. 1 (3d Cir.1980) ("An equal protection claim arises when an individual contends that he or she is receiving different treatment from that received by other individuals similarly situated.").

*14 Based upon the undisputed facts, it cannot be concluded that the Defendants engaged in intentional or purposeful discrimination or that they treated Wilkins differently from similarly situated individuals on the basis of his race (Wilkins is Black) or some other impermissible reason. There are simply no factual averments which could support a claim that the Defendants engaged in actions which intentionally discriminated against the prisoner.

2006 WL 860140, * 11.

Plaintiff has not alleged facts from which it can be concluded that our Defendants engaged in intentional or purposeful discrimination, or that he was treated differently by Defendants than similarly situated persons on the basis of his race, nationality or gender. In short, Plaintiff fails to allege discrimination with respect to his treatment he received from Defendants. There is not a cognizable equal protection claim stated.

Therefore, we shall recommend that Plaintiff's equal protection claim against Defendants be dismissed.[6]

VII. Recommendation.

Based on the foregoing, it is respectfully recommended that Plaintiff's *Bivens* action be dismissed as against all Defendants for failure to state a claim. It is further recommended that Plaintiff's Injunction Motion be dismissed as moot. (Doc. 2).[7]

*NOTICE*

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated April 2, 2007.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

All Citations

Not Reported in F.Supp.2d, 2007 WL 1650579

Footnotes

1 To state a *Bivens* claim, a plaintiff must allege that a person deprived him of a federal right, and that person who caused the deprivation acted under color of federal law. *See West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Young v. Keohane,* 809 F.Supp. 1185, 1199 (M.D.Pa.1992). Here, Plaintiff correctly indicates that this is a *Bivens* action, as he seeks monetary damages from federal officials for alleged violations of his Constitutional rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, (1971). (Rec. Doc. 1 at 1 n. 1).

2 Identified Defendants to this action are Joseph Smith, Former Warden at USP-Lewisburg ("Defendant Smith" or "the Warden"); Ray Hoekman, Special Investigator Administrator ("Defendant Hoekman"); and Matthew Eddenger, Special Investigation Supervisor ("Defendant Eddenger").

3 Unless otherwise noted, our factual summary is taken from Magistrate Judge's Report. (Rec.Doc.8).

4 Plaintiff claims that he has exhausted his administrative remedies regarding his present claim and indicates that he received a final denial from the BOP on August 31, 2005. (Rec.Doc.1).

5 In his Report, the Magistrate Judge accurately noted that pursuant to Local Rule 8.1 of this Court, Plaintiff's requests for specific amounts of monetary damages should be stricken from the Complaint as his seeking of unliquidated damages precludes any claim to a specific sum of relief. *See Stuckey v. Ross,* No. 05-2354, slip op. (M.D.Pa. Jan. 9, 2006) (McClure, J.). Indeed, Plaintiff concedes this point. (Rec. Doc. 9 at 1 n. 1). However, given our disposition of the remainder of the issues in this case, we find an Order striking Plaintiff's specific monetary requests to be unnecessary.

6 Plaintiff concedes as much in his Objection: "Generally speaking, Plaintiff concedes that there lies no constitutional right to a job in prison per se." (Rec. Doc. 10 at 6). Plaintiff, however, goes on to argue that circumstances surrounding the action created a right to his photographer job. We find said argument unpersuasive for all of the reasons outlined herein.

7 As outlined in the Magistrate Judge's Report, Plaintiff fails to state the personal involvement of any of the unnamed John Doe Defendants with respect to his two (2) claims. Even without such allegations, dismissal of both of instant claims against these unidentified Defendants is proper because the reasons for which Plaintiff's Due Process and Equal Protection claims fail are applicable regardless of the Defendants' identity. Moreover, without the identification, and serving, of said Defendants, their Due Process rights would be implicated were the instant action to proceed against them. (Rec. Doc. 8 at 6-7).

8 For the reasons outlined in the preceding note, we will also dismiss Plaintiff's Equal Protection claims against the unnamed John Doe Defendants.

9 In the interest of completeness, we note our agreement with the Magistrate Judge's conclusion that Plaintiff should not be permitted to amend his Complaint because doing so would be futile. *See Shane v. Fauver,* 213 F.3d 113, 115 (3d Cir.2000). Indeed, Plaintiff concedes as much by failing to argue in favor of such in his Objections.

1 *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Plaintiff correctly indicates that this is a *Bivens* action as he seeks monetary damages from federal officials for alleged violations of his Constitutional rights. Doc. 1, p. 1, ¶ 1.

2 Plaintiff must exhaust his administrative remedies prior to filing a civil rights suit. *Spruill v. Gillis,* 372 F.3d 218, 230 (3d Cir.2004); *Woodford v. Ngo,* --- U.S. ----, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). In *Porter v. Nussle,* 534 U.S. 516, 532, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), the Supreme Court reiterated that the exhaustion requirement under § 1997e(a) applies to all actions regarding prisons conditions, including civil rights actions or actions brought pursuant to any other federal law. The *Porter* Court held that "the PLRA's 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." *Id.* However, Defendants have the burden to plead exhaustion as an affirmative defense. *See Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir.2002).

3 Pub.L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

4 As stated above, Plaintiff paid the required filing fee. (Docs. 6 & 7).

5 Plaintiff provided a citation to BOP policy 28 C.F.R. § 541.10(2). (Doc. 1, pp. 8-9).

6 As stated above, we also find that Plaintiff's Injunction Motion (Doc. 2) should be dismissed as moot, since Plaintiff cannot show any likelihood of success on the merits of either of his claims. *See* *In Re Arthur Treacher's Franchise Litigation,* 689 F.2d 1137, 1143 (3d Cir.1982) ("[A] failure to show a likelihood of success or a failure to demonstrate irreparable injury must necessarily result in the denial of a preliminary injunction.").

7 Notwithstanding Vieux's *pro se* status, we do not recommend that he be permitted to amend his Complaint regarding his due process and equal protection claims since we find that based on well-settled case law that he fails to state such claims. Thus, we find futility of any amendment of this claim, and we shall not recommend Plaintiff be granted leave to amend his action. *See* *Forman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1982); *Shane v. Fauver,* 213 F.3d 113, 115 (3d Cir.2000) (The futility exception means that a complaint, as amended, would fail to state a claim upon which relief can be granted); *Alston v. Parker,* 363 F.3d 229, 236 (3d Cir.2004).

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