IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDWARD LEE MARTINEZ	§	
#1253933	§	
	§	
V.	§	**A-16-CA-651-LY**
	§	
GREG ABBOTT,	§	
et al.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(f) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates.

Before the Court are Plaintiff Edward Lee Martinez's Amended Complaint (Document 12); Defendants' Motion to Dismiss, which was converted to a motion for summary judgment (Document 18); Plaintiff's response (Document 22); Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Document 24); and Defendants' summary judgment evidence (Document 26). Plaintiff was given an extension of time to file his own summary judgment evidence, but did not file any. Plaintiff was granted leave to proceed in forma pauperis.

STATEMENT OF THE CASE

At the time he filed his complaint pursuant to 42 U.S.C. § 1983, Plaintiff was confined in the Robertson Unit of the Texas Department of Criminal Justice - Correctional Institutions Division.

Plaintiff was convicted of burglary of a habitation with intent to commit theft and was sentenced to 99 years in prison.

Plaintiff alleges his right to due process and equal protection were violated when he was reviewed for and denied parole. Plaintiff contends he was discriminated against on the basis of race and his writ writing activities. Plaintiff advises two similarly situated Caucasian inmates, James Fox and Kenneth Pace, with similar offenses were granted parole, but Plaintiff, an Hispanic inmate, was not. According to Plaintiff, he was reviewed for parole in 2009 and given a five-year set-off. He was subsequently reviewed for parole in 2014 and given a four-year set-off.

Plaintiff complains he was not afforded a fair parole hearing interview or notification of the parole panel's decision to deny him parole in 2014. He further complains Parole Officer Gabriel had no authority to conduct his parole interview in 2014. Plaintiff contends Gabriel acted with evil intent and motivation to discriminate against him and deny Plaintiff parole due to his race, writ writing activity and claim of actual innocence. He also alleges Gabriel did not investigate Plaintiff's proposed parole plan.

Plaintiff sues Governor Greg Abbott, former Chairperson of the Board of Pardons and Paroles Rissie Owens, Parole Board Members David Gutierrez, James LaFavers, Federico Rangel, Michelle Skyrme, Fred Solis, and Cynthia Tauss, and Parole Commissioners Marsha Moberley and Charles Shipman, and Parole Officer Gabriel. He seeks a declaratory judgment, a preliminary and permanent injunction, compensatory, nominal and punitive damages, and costs.

After consideration of Plaintiff's amended complaint, the Court ordered service on all of the defendants except Governor Greg Abbott. The served defendants move to dismiss Plaintiff's complaint and argue there is no constitutional right to parole release. They conclude Plaintiff has

failed to allege a valid procedural due process claim. With regard to Plaintiff's equal protection claim the served defendants argue Plaintiff has no constitutional expectancy of release on parole and the Texas parole laws and guidelines do not target a suspect class. Defendants further argue Plaintiff failed to assert facts indicating Defendants Owens, Gutierrez, LaFavers, Rangel, Skyrme, Solis, and Tauss were personally involved in a constitutional deprivation. Defendants also argue Owens, Gutierrez, LaFavers, Rangel, Skyrme, Solis, Tauss, Moberley, and Shipman are entitled to absolute immunity. To the extent the defendants are sued in their official capacities for monetary damages, the defendants assert their entitlement to Eleventh Amendment immunity. The defendants also assert their entitlement to qualified immunity.

After consideration of Defendants' Motion to Dismiss, the Court converted the motion to a motion for summary judgment and allowed the parties the opportunity to present summary judgment evidence. Defendants' summary judgment evidence shows Plaintiff was reviewed for parole on October 12, 2009. A parole panel, consisting of Thomas Leeper and Roy Garcia, reviewed Plaintiff's case and determined he should be denied parole and set his next review date for October 2014. On September 29, 2014, a parole panel, consisting of Marsha Moberley and Charles Shipman, reviewed Plaintiff's case and determined he should be denied parole and set his next review for September 2018. On August 8, 2016, Plaintiff's case was placed in Special Review due to an administrative processing error. On September 21, 2016, a parole panel reviewed Plaintiff's case and determined he should be denied parole and set his next review for September 2017. Defendants assert the 2016 parole panel consisted of Moberley and James LaFavers. However, the initials "ER" on the parole minutes do not match Moberley's initials "MM." Regardless, it is clear Plaintiff was denied parole on that date.

DISCUSSION AND ANALYSIS

A. Standard Under 28 U.S.C. § 1915(e)

Because the Court did not order service on Governor Abbott, the Court will analyze Plaintiff's claims brought against the Governor pursuant to 28 U.S.C. § 1915(e). An in forma pauperis proceeding may be dismissed sua sponte under 28 U.S.C. § 1915(e) if the court determines the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief against a defendant who is immune from suit. A dismissal for frivolousness or maliciousness may occur at any time, before or after service of process and before or after the defendant's answer. Green v. McKaskle, 788 F.2d 1116, 1119 (5th Cir. 1986).

When reviewing a plaintiff's complaint, the court must construe plaintiff's allegations as liberally as possible. Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594 (1972). However, the petitioner's pro se status does not offer him "an impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation and abuse already overloaded court dockets." Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986).

B. Summary Judgment Standard

The Court will analyze Plaintiff's claims against the remaining defendants pursuant to the summary judgment standard. A court will, on a motion for summary judgment, render judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir. 1996); Int'l Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1263 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992). When a motion for summary judgment is made and supported, an adverse party may not rest

upon mere allegations or denials but must set forth specific facts showing there is a genuine issue for trial. Ray v. Tandem Computers, Inc., 63 F.3d 429, 433 (5th Cir. 1995); FED. R. CIV. P. 56.[1]

Both movants and non-movants bear burdens of proof in the summary judgment process. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The movant with the burden of proof at trial must establish every essential element of its claim or affirmative defense. Id. at 322. In so doing, the moving party without the burden of proof need only point to the absence of evidence on an essential element of the non-movant's claims or affirmative defenses. Id. at 323-24. At that point, the burden shifts to the non-moving party to "produce evidence in support of its claims or affirmative defenses . . . designating specific facts showing that there is a genuine issue for trial." Id. at 324. The non-moving party must produce "specific facts" showing a genuine issue for trial, not mere general allegations. Tubacex v. M/V Risan, 45 F.3d 951, 954 (5th Cir. 1995).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." James v. Sadler, 909 F.2d 834, 837 (5th Cir. 1990) (citing Matsushita, 475 U.S. at 586)). To the extent

[1]Effective December 1, 2010, Rule 56 was amended. Although there is a slight language change and a change in the designation of subsections, the legal standard remains the same. See FED. R. CIV. P. 56(a) (eff. Dec.1, 2010) ("The court shall 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.").

facts are undisputed, a court may resolve the case as a matter of law. Blackwell v. Barton, 34 F.3d 298, 301 (5th Cir. 1994).

C. Eleventh Amendment Immunity

In his response to Defendants' Motion to Dismiss Plaintiff asserts he is seeking damages against the defendants in their individual capacities only. However, Plaintiff's request for relief in his amended complaint is not clear.

To the extent Plaintiff sues the defendants in their official capacities for monetary damages, Defendants are immune from suit under the Eleventh Amendment because such an action is the same as a suit against the sovereign. Pennhurst State School Hosp. v. Halderman, 465 U.S. 89 (1984). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. Port Auth. Trans-Hudson v. Feeney, 495 U.S. 299, 304 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity because such an indirect pleading remains in essence a claim upon the state treasury. Green v. State Bar of Texas, 27 F.3d 1083,1087 (5th Cir. 1994).

D. Absolute Immunity

The defendants, who voted on Plaintiff's parole, are also protected by absolute immunity. See Littles v. Board of Pardons and Paroles Div., 68 F.3d 122, 123 (5th Cir. 1995). Parole officers are entitled to absolute immunity from liability for their conduct in parole decisions and in the exercise of their decision-making powers. Id. Accordingly, Defendants Moberley, Shipman, and LaFavers are protected by absolute immunity.

E. Supervisory Liability

Plaintiff's allegations against Governor Abbot and former Chairperson Rissie Owens appear to be based on theories of respondeat superior and/or supervisory liability. Neither theory is sufficient to support a claim under § 1983. Rather, "[p]ersonal involvement is an essential element of a civil rights cause of action." Thompson v. Steele, 709 F.2d 381, 382 (5th Cir. 1983) (citation omitted). Supervisors must either actively participate in the acts complained of or implement unconstitutional policies that result in injury. Mouille v. City of Live Oak, Tex., 977 F.2d 924, 929 (5th Cir. 1992). Similarly, Plaintiff has not alleged any personal involvement on the part of Defendants Gutierrez, Rangel, Skyrme, Solis, and Tauss. Plaintiff's claims against these defendants and Defendants Abbott and Owens are insufficient to support a claim under § 1983.

F. Due Process

To the extent Plaintiff contends the denial of parole violated his rights to due process his claims fail. As explained by the Fifth Circuit, "[t]he protections of the Due Process Clause are only invoked when State procedures which may produce erroneous or unreliable results imperil a protected liberty or property interest." Johnson v. Rodriguez, 110 F.3d 299, 308 (5th Cir.), cert. denied, 522 U.S. 995 (1997) (citations omitted). Because Texas prisoners have no constitutionally protected liberty interest in parole, they cannot mount a challenge against any state parole review procedure on procedural (or substantive) Due Process grounds. Id. (citations omitted). In Johnson, the Fifth Circuit concluded Johnson's allegations that the Texas Board of Pardons and Paroles considers unreliable or even false information in making parole determinations, without more, simply do not assert a federal constitutional violation. Id. "[I]n the absence of a cognizable liberty interest, a state prisoner cannot challenge parole procedures under the Due Process Clause." Id. at

309 n.13. Because Plaintiff has no liberty interest in obtaining parole in Texas, he has no claim for violation of due process in the procedures attendant to his parole decisions. Orellana v. Kyle, 65 F.3d 29, 31 (5th Cir. 1995).

G. Equal Protection

Plaintiff also has not shown his rights to equal protection were violated. A violation of equal protection occurs only when the governmental action in question "classif[ies] or distinguish[es] between two or more relevant persons or groups[,]" Brennan v. Stewart, 834 F.2d 1248, 1257 (5th Cir.1988), or when a classification impermissibly interferes with a fundamental right. Hatten v. Rains, 854 F.2d 687, 690 (5th Cir.1988). A "fundamental right," for purposes of equal protection analysis, is one that is "among the rights and liberties protected by the Constitution." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

Plaintiff attempts to identify two similarly situated Caucasian inmates, who were granted parole after having been incarcerated for 10 to 12 years. Plaintiff asserts he had been incarcerated for 11 years at the time he was denied parole in 2014.

Contrary to Plaintiff's contention, the two inmates identified by Plaintiff are not at all similarly situated to Plaintiff. The two inmates Plaintiff identified, James Fox and Kenneth Pace, are two of his accomplices.

> During the night of April 25, 2003, the home insurance office of A.L. Hawkins, an eighty-one-year-old man, was broken into in an attempt to steal money. Hawkins was stabbed multiple times and nearly died. [Plaintiff] had worked as a roofer on the house several months earlier and had the opportunity to observe cash being kept in the office. (footnote omitted). He and his friends James Fox, Kenneth Pace, and Seth Stone were accused of having committed the burglary. They had allegedly obtained bolt cutters from Fox's girlfriend, Margaret Estrada, and then obtained a ride from Michael Johnson and Kelly McGaha to the location. The latter was across the street from Monterey High School. Fox, Pace, and Stone all pled guilty to the offense.

> Based on their testimony and the testimony of Johnson and Estrada, [Plaintiff] was convicted of the offense.

Martinez v. State, 252 S.W.3d 649, 650 (Tex. App. – Amarillo 2008, pet. ref'd).

Plaintiff was sentenced to 99 years in prison after a jury trial and still asserts his actual innocence. Fox and Pace admitted their guilt, testified against Plaintiff at trial, and received sentences of 20 and 25 years, respectively. Fox and Pace served approximately 50 percent of their sentences before being released on parole. Plaintiff, on the other hand, had only served 11 percent of his sentence when he was denied parole.

Plaintiff's allegations fail to show he was intentionally treated differently from other prisoners absent a rational basis. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Vague and conclusional allegations that a prisoner's equal protection rights have been violated are insufficient to raise an equal protection claim. Pedraza v. Meyer, 919 F.2d 317, 318 n.1 (5th Cir. 1990).

H. Retaliation

Plaintiff contends the denial of his parole was in retaliation for his writ writing activities. "To state a valid claim for retaliation under section 1983, a prisoner must allege (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." Jones v. Greninger, 188 F.3d 322, 324–25 (5th Cir. 1999). "Mere conclusionary allegations of retaliation" are insufficient. Id. at 325. A prisoner must either "produce direct evidence of motivation" or "allege a chronology of events from which retaliation may plausibly be inferred." Id. (quoting Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995). The relevant showing must be more than the prisoner's personal belief that he is the

victim of retaliation. Johnson v. Rodriguez, 110 F.3d 299, 310 (5th Cir. 1997) (citing Woods v. Edwards, 51 F.3d 577, 580 (5th Cir. 1995)).

Plaintiff fails to allege facts sufficient to support a claim that he was denied parole in retaliation for his writ writing activities. Specifically, Plaintiff fails to plead anything other than bare conclusions to demonstrate that the denial of parole was the result of an intent to retaliate against him.

RECOMMENDATION

It is therefore recommended that the Motion to Dismiss [#18], which the Court converted to a motion for summary judgment, filed by Defendants Owens, Gutierrez, LaFavers, Rangel, Skyrme, Solis, Tauss, Moberley, Shipman, and Gabriel be **GRANTED**. It is further recommended that Plaintiff's claims against these defendants in their official capacities for monetary damages be **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction, Plaintiff's claims against Defendants LaFavers, Moberley, and Shipman in their individual capacities for monetary damages be **DISMISSED WITH PREJUDICE** due to absolute immunity, and a **TAKE NOTHING** judgment be rendered with regard to Plaintiff's remaining claims against Defendants Owens, Gutierrez, LaFavers, Rangel, Skyrme, Solis, Tauss, Moberley, Shipman, and Gabriel. It is further recommended that Plaintiff's claims against Governor Abbott in this official capacity for monetary damages be **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction and Plaintiff's remaining claims against Governor Abbott be **DISMISSED WITH PREJUDICE** as frivolous pursuant to 28 U.S.C. § 1915(e). It is finally recommended that Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction [#24] be **DENIED**.

OBJECTIONS

Within 14 days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C). Failure to file written objections to the proposed findings and recommendations contained within this report within 14 days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. Douglass v. United Servs. Auto. Assoc., 79 F.3d 1415 (5th Cir. 1996)(en banc); Thomas v. Arn, 474 U.S. 140, 148 (1985); Rodriguez v. Bowen, 857 F.2d 275, 276-277 (5th Cir. 1988).

SIGNED on July 21, 2017.

MARK LANE
UNITED STATES MAGISTRATE JUDGE