UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

O

CIVIL MINUTES - GENERAL

Case No.	CV11-254 CAS (DTBx)	Date	July 11, 2011
Title	DAVID BRYANT v. UNITED STATES BUREAU OF PRISONS, ET AL.		

Present: The Honorable	CHRISTINA A. SNYDER	
CATHERINE JEANG	LAURA ELIAS	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Adam Paris Rory Culver Andrew Gelfand Matthew Fitzwater Deborah Golden	Monica Miller Chung Han

Proceedings: **DEFENDANT UNITED STATES BUREAU OF PRISONS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR VIOLATIONS OF THE REHABILITATION ACT AND VIOLATIONS OF THE FIRST, FIFTH, AND EIGHTH AMENDMENTS** (filed 05/31/11)

I. INTRODUCTION

On January 7, 201,1 plaintiff filed a complaint for violations of the Rehabilitation Act as well as the first, fifth, and eighth amendments against the United States Bureau of Prisons, Harley G. Lappin in his official capacity as Director of the United States Bureau of Prisons, Robert E. McFadden, in his official capacity as Regional Director of the United States Bureau of Prisons Western Region, and Francisco J. Quintana, in his official capacity as Warden of USP Victorville (collectively, "defendants"). On May 31, 2011, defendants filed a motion to dismiss, followed immediately on the same day with an amended motion to dismiss. On June 20, 2011, plaintiff filed his opposition to defendants' motion to dismiss. On June 27, 2011 defendants filed their reply. Having carefully considered the parties' arguments, the Court finds and concludes as follows.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV11-254 CAS (DTBx)	Date	July 11, 2011
Title	DAVID BRYANT v. UNITED STATES BUREAU OF PRISONS, ET AL.		

II. LEGAL STANDARD

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in a complaint. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. Stated differently, only a complaint that states a claim for relief that is "plausible on its face" survives a motion to dismiss. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009) (quoting Twombly, 550 U.S. at 570). "The plausibility standard is not akin to the 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

In considering a motion pursuant to Fed. R. Civ. P. 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). However, a court need not accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. Sprewell, 266 F.3d at 988; W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

Dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pac. Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the

complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

For all of these reasons, it is only under extraordinary circumstances that dismissal is proper under Rule 12(b)(6). United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

III. DISCUSSION

Plaintiff is an inmate currently serving a life sentence in federal prison. Mot. at 1. Since 2005, plaintiff has been incarcerated in three different prisons: Hazelton in West Virginia, Coleman I in Florida, and Victorville in California. Id. Plaintiff alleges that he has "severe to profound sensorineural hearing loss in his left ear and profound sensorineural hearing loss in his right ear." Compl. ¶ 1. Plaintiff contends that even with the use of hearing aids, he "[g]enerally. . . is unable to hear any spoken words" and "under no circumstances . . . [can] hear or understand spoken conversation." Id. Plaintiff alleges that he uses hearing aids to "better sense his surroundings by hearing noise or loud sounds" however the model he uses requires new batteries within a "few days to a few weeks." Id. Plaintiff also alleges that his primary language is American Sign Language (ASL) and that he is "functionally illiterate." Id. ¶¶ 1-2.

Plaintiff alleges that due to defendants' failure to provide him with a qualified ASL interpreter or "other reasonable auxiliary aids and services" plaintiff has been "unable to communicate effectively with health care providers and mental health professionals, raise medical issues, discuss mental health concerns, or understand the treatments and medications they prescribe; excluded from participating in the same education, vocational

and rehabilitation classes and work programs as hearing prisoners; deprived of knowledge or understanding of prison-wide safety and/or emergency announcements; deprived of knowledge or understanding of prison counts, meals and other important daily prison activities; unable to communicate effectively with correctional officers ("COs") and other prison staff; subject to disciplinary action stemming from [d]efendants' refusal to accommodate his deafness; unable to communicate effectively during such disciplinary action hearings; attacked by other inmates for attempting to activate close captioning on the television in his unit; and prevented from contacting family, friends and his attorneys." Id. ¶¶ 3-4. Additionally, plaintiff contends that the prisons in which he has been incarcerated lack adequate equipment for him to be able to watch television or talk on the telephone and that the lack of a translator has deprived him of the ability to participate in prison activities or communicate effectively with prison guards. Id. ¶¶ 2-3.

Plaintiff seeks: "a qualified ASL interpreter . . . non-aural, non-written notification of emergencies or other important events and announcements, e.g., a vibrating pager; batteries for . . . hearing aid as needed; access to telecommunication devices appropriate for the deaf such as a videophone or TTY, equal to the telephone privileges of hearing inmates; and safe access to a television enabled with closed-captioning, commensurate with the television privileges afforded to other inmates. In the alternative. . .[plaintiff] requests a transfer to another prison, state or federal, with deaf inmates and programs for the deaf." Id. at 4-5.

Defendants "deny that the BOP violated the Rehabilitation Act or [p]laintiff's Constitutional rights during his incarceration." Mot. at 1. Additionally, defendants allege that plaintiff has failed to exhaust all available administrative remedies as required under the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e. Mot. at 2. Defendants contend that in addition to "the internal prison grievance administrative process, the Department of Justice ("DOJ")(of which the BOP is a component) has provided a separate process by which a federal inmate's alleged violations of the Rehabilitation Act will be investigated and resolved. 28 C.F.R. § 39.170." Id. Defendants contend that while plaintiff has exhausted the internal prison grievance process, he has not complied with the process set forth in 28 C.F.R. § 39.170. Therefore, defendants argue that plaintiff has not exhausted the DOJ process, and thus, this lawsuit

is premature. Id. Additionally, defendants allege that plaintiff filed a complaint with the DOJ Equal Employment Opportunity ("EEO") Office on May 2, 201,1 and that the EEO has 180 days to "'complete the investigation of the complaint, attempt informal resolution, and, if no informal resolution is achieved, issue a letter of findings.'. . . [after which] complainant has 30 days to appeal." Mot. at 3 (quoting 28 C.F.R. § 39.170(g)(1)).

Plaintiff contends that since he has exhausted the prison's internal grievance process, he has satisfied the exhaustion requirement under the PLRA. Opp. at 2. Additionally, he alleges that defendants fail to "meet their burden of showing that the DOJ process under 28 C.F.R. § 39.170 is even available to Bryant." Id. Plaintiff also alleges that he never filed a complaint with the DOJ EEO, but rather, counsel contacted "several government agencies to learn more about the process–including whether such a process even existed. No agency had any knowledge of it." Id. Additionally, plaintiff argues that the additional grievance process alleged by defendants applies only to the Rehabilitation Act claim, and thus should the Court grant defendants motion, it should only apply to that claim and the Constitutional violations should be allowed to proceed.

There is no dispute that plaintiff has exhausted his BOP administrative remedies. See Mot. at 2; Opp. at 2. However, the issue before the Court is whether plaintiff must file an additional claim under 28 C.F.R. §39.170 in order to fulfill the exhaustion requirement set forth in the PLRA.[1] "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." Jones v. Bock, 549 U.S. 199 (2007). In order to exhaust a claim, "prisoners must complete the administrative review process in accordance with the applicable procedural rules [which are] defined not by the PLRA, but by the prison grievance process itself." Woodford v. Ngo, 548 U.S. 81, 88 (2006).

[1] The applicable statute reads: " No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C § 1997e(a)(West).

Since 28 C.F.R. §39.170 "applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the [DOJ]," the Court concludes that it applies to plaintiff's Rehabilitation Act claim. The wording of 28 C.F.R. § 39.170 clearly contemplates that a federal prisoner would first exhaust BOP Administrative remedies, and then use this additional administrative remedy to redress his grievances under the Rehabilitation Act. See 28 C.F.R. § 39.170(d)(1)(ii) ("[b]efore filing a complaint under this section, an inmate in a federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedures as set forth in 28 CFR part 542 [sic]."). However, 28 C.F.R. § 39.101 states that "[t]his part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies. . ." As such, the Court believes that 28 C.F.R. § 39.170 is only applicable to plaintiff's first claim for violation of the Rehabilitation Act. Therefore, the Court finds that plaintiff has not exhausted all the administrative remedies available to him for his Rehabilitation Act Claim, as required by the PLRA, and dismisses that claim without prejudice.[2]

[2] The Court finds that the administrative remedy under 28 C.F.R. § 39.170 was not unavailable to plaintiff. The PLRA requires exhaustion of "such administrative remedies as are available" 42 U.S.C § 1997e(a). "An administrative remedy is not 'available' to an inmate does not know about, and cannot discover through reasonable effort. . . remedies or requirements for remedies . . . by the time they are needed." Williams v. Marshall, 319 F. App'x 764, 768 (11th Cir. 2008). The 9th Circuit has excused an inmate from strict adherence to the exhaustion requirement where prison officials have obstructed a prisoner's access to information or misled the prisoner to believe that the timing to file a complaint is different than it actually is. See Ngo v. Woodford, 539 F.3d 1118, 1110 (9th Cir. 2008). See also Nunez v. Duncan, 591 F.3d 1217, 1226 (9th Cir, 2010)(holding that exhaustion was "excused" and administrative remedies were effectively unavailable where prison provided prisoner with wrong information regarding administrative process.). However, here, no facts suggest that Bryant was denied access to information, or misled as to the requirements for filing a complaint. As plaintiff is represented by counsel, it seems that Bryant had access to information about all administrative remedies available. As such, the Court cannot excuse plaintiff from exhausting the administrative

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV11-254 CAS (DTBx)	Date	July 11, 2011
Title	DAVID BRYANT v. UNITED STATES BUREAU OF PRISONS, ET AL.		

As 28 C.F.R. § 39.170 applies only to the Rehabilitation Act Claim, the Court denies defendants' motion to dismiss the remainder of plaintiff's claims. "[I]f a prisoner includes both exhausted and unexhausted claims, the court should dismiss only the unexhausted claim or claims." Nunez v. Duncan, 591 F.3d 1217, 1224 (9th Cir. 2010)(citing Jones v. Bock, 549 U.S. 199 (2007)). However, in the interest if judicial economy, the Court STAYS the five claims alleging violation of plaintiff's constitutional rights until the BOP EEO has completed its process pursuant to 28 C.F.R. § 39.170. The parties are instructed to file a joint status report within 21 days of the BOP EEO's determination of plaintiff's Rehabilitation Act grievance as to its effect on the current dispute.

IV. CONCLUSION

Defendant's motion to dismiss is GRANTED with respect to plaintiff's first claim. The second, third, fourth, fifth and six claims are STAYED pending exhaustion of the first claim.

IT IS SO ORDERED.

00 : 13

Initials of Preparer CMJ

remedies available to him before filing in this Court as required by the PLRA.