

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 4:03-40226-GAO

STEVEN JUDE HOFFENBERG  
Plaintiff,

v.

FEDERAL BUREAU OF PRISONS, HENRY J. SADOWSKI,  
EDWARD MOTLEY, HARRELL WATTS, DAVID PORTER, JR.,  
TIM FAZENBAKER, LYNNE BALZEWSKI, CHRIS HARDING,  
DAVID WINN and 30 JOHN DOE PRISON STAFF,  
Defendants

MEMORANDUM AND ORDER

September 14, 2004

O'TOOLE, D.J.

This matter was referred to the Chief Magistrate Judge for a report and recommendation on the defendants' motion to dismiss or, in the alternative, for summary judgment. After review, I am satisfied that the Chief Magistrate Judge correctly resolved the issues addressed and I therefore adopt her report and recommendation to the extent it allowed the defendants' motion in part. After careful consideration of the parties' briefs submitted in response to the report and recommendation, I also conclude that judgment ought to be granted for the defendants on the plaintiff's remaining claims, as identified by the Chief Magistrate Judge, namely: (i) the Bivens<sup>1</sup> claims in causes of action two and three, (ii) the Federal Tort Claims Act ("FTCA")<sup>2</sup> claims in causes of action one, two, three and four, and (iii) claims for violation of 28 C.F.R. §§ 540.103 and 545.10.

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<sup>1</sup> Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

<sup>2</sup> 28 U.S.C. §§ 1346(b) and 2671-2680.

A. The Bivens Claims

The only constitutional rights even remotely implicated in the plaintiff's second and third causes of action appear to be the right to counsel and the right of access to the courts, neither of which provides any basis for a claim in the circumstances pleaded. The right to counsel under the Sixth Amendment is limited to the defense of criminal prosecutions and is not applicable to the plaintiff's pursuit of civil actions for damages. The constitutional right of access to the courts is also narrow in scope and does not give the plaintiff a constitutional right to the assistance of counsel in civil cases. Boivin v. Black, 225 F.3d 36, 42 (1st Cir. 2000). Rather, it is limited to appeals from criminal convictions, petitions for habeas corpus, and civil rights actions. Lewis v. Casey, 518 U.S. 343, 354 (1996). Furthermore, the right of access to courts "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." Id. at 355. Nor does it enable prisoners to "litigate with maximum effectiveness once in court." Boivin, 225 F.3d at 42.

Hoffenberg does not here challenge either his sentence or the physical conditions of his confinement. Instead he claims that limiting the extent of his telephone calls within any given month prevents him from retaining and using his attorney's services to help him collect, via various lawsuits, money he could use to pay the restitution imposed by his criminal judgment. Assuming arguendo that the limitation on Hoffenberg's telephonic access to counsel could be considered a "condition of confinement," it is nonetheless far too insubstantial a limitation to amount to a constitutional deprivation remediable under Bivens. At the very least, such a proposition has not been "clearly established," and the defendants would be entitled to qualified immunity as to such a claim. See Anderson v. Creighton, 483 U.S. 635, 640 (1987).

B. The FTCA Claims

Giving Hoffenberg the full benefit of the doubt on the issue of exhaustion, he still does not state a cause of action under the FTCA because the asserted prison regulations and policy statements do not create a legal right enforceable in an action for damages and Hoffenberg provides no other substantive, viable source for his FTCA claims.

The regulations at issue here, 28 C.F.R. §§ 540.103, 543.12, and 545.10, relate to the institutional management of the Bureau of Prisons and regulate the conduct of its employees. On their face, they do not provide for a private right of action and there is no indication that Congress intended them to create an implied private right of action. See Bonano v. East Caribbean Airline Corp., 365 F.3d 81, 84 (1st Cir. 2004) (“[A] regulation, on its own, cannot create a private right of action.”). See also, 18 U.S.C. §§ 4001, 4042. Hoffenberg’s putative constitutional tort claims are also not actionable under the FTCA, and he has failed to plead and prove a source of substantive liability under state tort law. F.D.I.C. v. Meyer, 510 U.S. 471, 477-78 (1994).

C. The Claims for Violations of 28 C.F.R. §§ 540.103 and 545.10

As noted above, Hoffenberg has no cause of action for violations of the asserted Bureau of Prison regulations. To the extent such claims were allowed by the Chief Magistrate Judge to remain in the action, they are now dismissed.

D. Conclusion

For the foregoing reasons, I adopt the report and recommendation of the Chief Magistrate Judge to the extent it recommended dismissal of claims, but not otherwise. I grant judgment for the defendants dismissing all of the plaintiff’s claims against them.

It is SO ORDERED.

September 14, 2004 \_\_\_\_\_  
DATE

\s\ George A. O’Toole, Jr. \_\_\_\_\_  
DISTRICT JUDGE