UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ROOSEVELT L. WHITE, Plaintiff,	:	
v.	:	C.A. No. 18-261WES
MAGISTRATE JOHN F. MCBURNEY, III, PETER C. KILMARTIN, KIMBERLY AHERN, ROBERT F. MCNELIS, JEFFREY ACETO, PATRICIA COYNE-FAGUE, JAMES WEEDEN, MATTHEW KETTLE, A.T. WALL, BILLY BAGONES, NUNO FIGUREDO, STATE OF RHODE ISLAND, and DEPARTMENT OF CORRECTIONS, Defendants.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

On May 9, 2018, Plaintiff Roosevelt L. White, an inmate at the Adult Correctional Institutions ("ACI"), filed a *pro se* handwritten complaint against the State of Rhode Island; the Rhode Island Department of Corrections ("RIDOC"); a Rhode Island judge, Magistrate John F. McBurney, III; two Rhode Island prosecutors, Attorney General Peter C. Kilmartin and Special Assistant Attorney General Kimberly Ahern; a private attorney who acted as Plaintiff's defense counsel, Robert F. McNelis; and seven senior RIDOC officials. ECF No. 1 at 1. All defendants are sued in their official and individual capacities. Id. Along with his complaint, Plaintiff filed a motion for leave to proceed *in forma pauperis* ("IFP") and a motion to appoint counsel, ECF Nos. 2, 3, both of which have been referred to me for determination.

Based on my review of the IFP application, I have concluded that Plaintiff has satisfied the requirements of 28 U.S.C. § 1915(a)(2), and his IFP motion will be granted by a separate order issued today. However, because of the IFP application and Plaintiff's status as a prisoner,

this case is subject to preliminary screening under 28 U.S.C. §§ 1915(e)(2) and 1915A. For the reasons that follow, I recommend that, except for the retaliation claims against defendants Nuno Figuredo and Billy Bagones, the other defendants should be dismissed for failure to state a claim and, as to the judge and the prosecutors, because those defendants are immune from suit.

The analysis follows.

I. BACKGROUND

Plaintiff has filed a disjointed and rambling complaint, which, even when leniently read,[1] fails to tell a coherent story. It begins with the allegation that Plaintiff was convicted in 2015 and sentenced to fifteen years to serve in High Security. ECF No. 1 at 3. Then it jumps back to 2014, when Plaintiff alleges he was incarcerated following a violation of his conditions for possessing a controlled substance while driving a car owned by "Atty. Robert," presumably defendant Robert McNelis. Id. at 3 ¶ 1. Plaintiff asserts the presiding judicial officer (defendant Magistrate John F. McBurney, III) and an unnamed prosecutor told Plaintiff's attorney what they "'want' me to serve," and that Plaintiff's attorney (presumably defendant McNelis), for unspecified reasons, did not do an "adequate job" in defending. Id. at 3 ¶ 2. Plaintiff demanded new counsel and a hearing, but a hearing was not held in the timeframe originally mentioned by Magistrate McBurney. Id. at 3 ¶¶ 3-4. The complaint does not reveal what happened with the violation.

The complaint picks up the thread in November 2014 and alleges that, when Plaintiff was "back at A.C.I.," he was approached by defendants Nuno Figuredo and Billy Bagones, both alleged to be RIDOC investigators, about cooperating with the FBI. ECF No. 1 at 3 ¶¶ 5-8. The

[1] Because Plaintiff is *pro se*, I have employed a liberal construction of his filing. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 23 (1st Cir. 2000).

purpose of the cooperation is unclear, including whether it was somehow related to "Roberts contacts with other inmates," about which he alleges Figuredo asked him. Id. at 3 ¶ 6. The complaint alleges that Plaintiff believed that cooperation would lead to his getting released, id. at 3 ¶ 9, rightly as the proposal was approved by Magistrate McBurney and the prosecutor. Id. at 3 ¶¶ 10-11. Plaintiff cooperated as required but was uncomfortable doing drug buys; he told defendants Figuredo and Bagones, "it is not are deal." Id. at 3 ¶ 14. The complaint alleges that "Robert is still Complainants lawyer knows nothing of Fed op." Id. at 3 ¶ 12.

The next event in the sequence appears to be a new charge – described in the complaint as a "new 32(f) for sexual assault" – prosecuted by defendant Ahern. Id. at 3 ¶¶ 15-16. This paragraph of the complaint adds an oblique observation that the "old 32(f)" was "not mentioned."[2] Id. at 3 ¶ 15. According to the complaint, this prosecutor told the judge (defendant McBurney) that Plaintiff had admitted the charge; when Plaintiff demanded a hearing, the judge refused. Id. at 3 ¶¶ 17-18. While Plaintiff was held at the ACI on this charge, defendants Figuredo and Bagones allegedly began to retaliate against him. Id. at 3 ¶ 19. Plaintiff also alleges he was the subject of disciplinary proceedings for a sexual assault on an inmate for which he received thirty-two days in segregation, and that the charges were dropped and Plaintiff cooperated "to the fullest" in the investigation. Id. at 4 ¶ 20. It is impossible to ascertain whether the sexual assault mentioned in ¶ 20 is the same as the one that was the basis for the "new 32(f)," referenced in ¶ 15. The complaint alleges that "[defendants Figuredo and Bagones]

[2] The complaint does not explain this reference. However, the published cases regarding Plaintiff include the Rhode Island Supreme Court's 2006 affirmance of judgment against him for violation of conditions of probation based on the charge of first-degree sexual assault; he was sentenced to serve twelve years. State v. White, 896 A.2d 733, 733-43 (R.I. 2006). Possibly this charge is the "old 32(f)."

have a frake [sic] investigation they used a sexual assault on a cell mate . . . to justify downgrade to H.S.C."[3] ECF No. 1 at 4 ¶ 20.

The next set of allegations relate to Plaintiff's filing of a post-conviction challenge (unclear to what), which included a claim of ineffective assistance of counsel. Id. at 4 ¶ 21. Defendants Figuredo and Bagones told him to drop it. Id. He presumably did not because the complaint alleges that his post-conviction petition resulted in a reduction of his sentence to "time served." Id. at 4 ¶ 25; ECF No. 1-1 at 2. While the petition was pending, Plaintiff was reclassified to High Security; the complaint charges that defendants Figuredo and Bagones "are even on Complainants Classification hearings on record to have him held in H.S.C. by a level 2 enemy." ECF No. 1 at 4 ¶ 22. The complaint also asserts that they threatened Plaintiff and told him that they "had a Women from D.O.C. Women's" press sexual assault charges. Id. at 4 ¶¶ 22-24.

Despite his apparent success with his post-conviction petition, at least as to the length of the sentence, the complaint alleges that Plaintiff remained incarcerated, held in High Security because he had been classified as a predator. Id. at 4 ¶¶ 26, 28. According to the attachments to the complaint, on September 13, 2016, defendant James Weeden (RIDOC's assistant director) confirmed that Plaintiff was classified to be held in High Security based on his "enemy list," which Plaintiff "refused to sign off on," as well as on his participation in "sexual acts at Medium Security." ECF No. 1-5 at 2. Defendant Weeden further advised that Plaintiff would be transferred out of High Security at the next scheduled hearing (presumably once the enemy was gone). Id. Also attached is a memorandum from Defendant Aceto acknowledging Plaintiff's grievance demanding that an investigator of the "Special Investigations Unit" be directed to

[3] Based on the clarification in complaint attachment 5, ECF No. 1-5 at 2, the Court assumes that Plaintiff's allegations regarding "H.S.C." refer to "High Security."

speak with him, as well as the receipt of calls from Plaintiff's family, and advising that redundant grievances making the same demand will not be responded to and could result in discipline. ECF No. 1-4 at 2.

The remainder of the RIDOC defendants (A.T. Wall, James Weeden, Matthew Kettle, Patricia Coyne-Fague and Jeffrey Aceto) are sued solely because they "didn't respond to my requests for help from retaliation." ECF No. 1 at 4 ¶ 27.

The complaint seeks only money damages; it does not pray for declaratory or injunctive relief from any of the defendants. Id. at 12.

II. STANDARD OF REVIEW

The legal standard for dismissing a complaint for failure to state a claim pursuant to §§ 1915(e)(2) and 1915A is the same used when ruling on a Rule 12(b)(6) motion to dismiss. Hodge v. Murphy, 808 F. Supp. 2d 405, 408 (D.R.I. 2011). To survive a motion to dismiss, a complaint must contain sufficient factual allegations to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

III. LAW AND ANALYSIS

A. Individual Capacity Claims[4] against Defendants Figuredo and Bagones and Other RIDOC Officials

Leniently read, Plaintiff appears to be trying to state a claim for damages caused by alleged retaliation by defendants Figuredo and Bagones based on their dissatisfaction with Plaintiff's discomfort with cooperation by doing drug buys. ECF No. 1 at 3-4. To state a claim for retaliation, a prisoner must allege that he engaged in protected activity, that the defendants

[4] The reasons why these defendants cannot be sued in their official capacities is discussed *infra*.

took an adverse action against him that would deter a prisoner of ordinary firmness from continuing to engage in that conduct, and that the action would not have been taken "but for" the alleged improper reason. Turner v. Wall, No. 15-1422, slip op. at 2 (1st Cir. Dec. 20, 2016); McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979). There is no question that the refusal to cooperate in an investigation can be a protected activity that may satisfy the first element of a § 1983 retaliation claim. Mearin v. Dohman, 533 F. App'x 60, 62-63 (3d Cir. 2013). Further, the complaint coherently alleges that defendants Figuredo and Bagones took adverse actions – arranging for the bringing of fabricated sexual assault charges – for the purpose of causing Plaintiff wrongly to be classified as a sexual predator with enemies and to be held in High Security. Although the complaint lacks any "but for" facts linking the protected conduct to the adverse actions and contains allegations that appear sufficient to establish that Plaintiff was classified and held in High Security for legitimate penological reasons, I nevertheless find that, for screening purposes, the complaint contains enough for the individual-capacity claim of retaliation by defendants Figuredo and Bagones to proceed. Whether these allegations are sufficient to clear the Fed. R. Civ. P. 12(b)(6) plausibility standard (should defendants present such a motion) is an issue for another day.

By contrast, Plaintiff's barebones, conclusory allegation that five other RIDOC senior officials "didn't respond to my requests for help from retaliation" should not survive screening because such officials may only be found liable in their individual capacities under § 1983 on the basis of their own acts or omissions. See Stone v. Wall, No. 11-127L, 2015 WL 1137544, at *4 (D.R.I. Mar. 12, 2015); Benbow v. Weeden, No. 13-334 ML, 2013 WL 4008698, at *8 (D.R.I. Aug. 5, 2013). It is well settled that the allegation that a prisoner notified a senior official of a claim of a constitutional violation is insufficient to state a claim. Benbow, 2013 WL 4008698, at

*8; see Walker v. Wall, No. 13-03-M, 2013 WL 3187031, at *7 (D.R.I. June 20, 2013) (allegation that prisoner wrote letters and appeals to Director Wall and received no response insufficient to state a claim for a constitutional violation). Accordingly, as pled, Plaintiff's complaint should be dismissed at screening for failure to state a claim as to all of the RIDOC officials sued in their individual capacities, except for defendants Figuredo and Bagones. Iqbal, 556 U.S. at 680 (complaint must nudge claims from conceivable to plausible); Twombly, 550 U.S. at 555 (to be plausible complaint must "give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests").

B. Claims against Judge and Prosecutors

Because they are immune, Plaintiff's claims against the judge and the two Rhode Island prosecutors should not survive screening. Magistrate McBurney is shielded by absolute judicial immunity. Rosario v. McBurney, No. CA 14-523 ML, 2015 WL 247868, at *2 (D.R.I. Jan. 20, 2015) (citing Forrester v. White, 484 U.S. 219, 225-28 (1988) (absolute judicial immunity originated in medieval times to discourage collateral attacks on judicial decision-making and to insulate judges from vexatious actions by disgruntled litigants)), aff'd, No. 15-1287 (1st Cir. Nov. 9, 2015). State court magistrates are entitled to absolute immunity under the same conditions as judges. Id. Relatedly, Attorney General Kilmartin and Special Assistant Attorney General Kimberly Ahern are shielded by prosecutorial immunity. Van de Kamp v. Goldstein, 555 U.S. 335, 340-43 (2009) (prosecutor enjoys absolute immunity as long as challenged conduct falls within function as advocate for a governmental entity). As such, all claims against the judge and both prosecutors are doomed because these defendants are immune. They should be dismissed.

C. Claims against State of Rhode Island, RIDOC and RIDOC Officials in Their Official Capacity

Plaintiff's claims against the State, RIDOC and all the RIDOC officials (Aceto, Coyne-Fague, Weeden, Kettle, Wall, Figuredo and Bagones) sued in their official capacities should be dismissed at screening because § 1983 claims for money damages cannot be asserted against the State, its agencies and its officials acting in their official capacities. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (holding "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); Walker v. Wall, No. CA 13-156-M, 2013 WL 2368863, at *6 (D.R.I. May 29, 2013) (all claims against "Director Wall, Assistant McCauley, Warden Weeden, and Deputy Warden Leach" dismissed); Jones v. Rhode Island, 724 F. Supp. 25, 28 (D.R.I. 1989) ("Based on the Supreme Court's holding in Will, it is clear that neither the State of Rhode Island nor any of its officials acting in their official capacities, are 'persons' that can be held liable under § 1983.").

D. Claims against Attorney Robert McNelis

Plaintiff's complaint, regarding his attorney, relies solely on the conclusory allegations that the "lawyer wasn't doing a adequate job in my defense," as well as that he provided "ineffective assistance of counsel as well as 6th Amendment." ECF No. 1 at 2, 3 ¶ 2. The utter inadequacy of this pleading's attempt to state a plausible claim justifies a recommendation of dismissal at screening. Iqbal, 556 U.S. at 678 ("mere conclusory statements, do not suffice"). Further, while a claim of ineffective assistance of counsel may be a proper basis for a collateral attack on a conviction, it does not work as the foundation for a civil damage claim in federal court based on 42 U.S.C. § 1983. Section 1983 is limited to claims against a "person who, acting under color" of state law transgresses rights secured by the Constitution. 42 U.S.C. § 1983. As far as the complaint tells the tale, Attorney McNelis is a private citizen, not a state actor; therefore, any claim against him under § 1983 cannot be viable. See Tierney v. Town of

Framingham, 292 F. Supp. 3d 534, 542 (D. Mass. 2018) ("It is well-settled that a lawyer (even a court-appointed one) does not act under the color of state law in performing a lawyer's traditional function as counsel to a party.") (quoting Aldrich v. Ruano, 952 F. Supp. 2d 295, 201 (D. Mass. 2013)); Murphy v. Maine, C.A. No. 06-062-ML, 2007 WL 2428816, at *2 (D.R.I. Aug. 22, 2007) ("[I]t is well-established that private attorneys are not state actors . . . ."). All claims against Attorney Robert McNelis should be dismissed.

IV. CONCLUSION

Based on the foregoing, I recommend that Plaintiff's claims against defendants Magistrate John F. McBurney, III, Attorney General Peter C. Kilmartin, Special Assistant Attorney General Kimberly Ahern, Attorney Robert F. McNelis, A.T. Wall, James Weeden, Matthew Kettle, Patricia Coyne-Fague and Jeffrey Aceto be dismissed for failure to state a claim and because the judge and prosecutors are immune from suit for money damages pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii-iii) and 1915A(b)(1-2). Relatedly I recommend that the official capacity claims against defendants Nuno Figuredo and Billy Bagones should be dismissed for failure to state a claim. Only the retaliation claim against defendants Figuredo and Bagones in their individual capacities should proceed. Nevertheless, because Plaintiff may be able to cure some of the deficiencies identified in this report and recommendation, I also recommend that Plaintiff be allowed to file an amended complaint within thirty days of the Court's adoption of this report and recommendation. See Brown v. Rhode Island, 511 F. App'x 4, 5-7 (1st Cir. 2013).

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a

timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 6, 2018