UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

VICTOR A. TAVARES, ex rel. UNITED STATES and STATE OF RHODE ISLAND, Plaintiff,	:	
v.	:	C.A. No. 19-266WES
MATTHEW KETTLE, JEFFREY ACETO, MICHAEL MOORE, DISCIPLINARY HEARING OFFICERS, and CAPTAIN HAIBON, Defendants.	:	

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge.

Plaintiff Victor A. Tavares, a *pro se*[1] prisoner, filed this *qui tam* action against the above-named Defendants. ECF No. 1. Along with his complaint, Plaintiff filed an Application to Proceed without Prepayment of Fees and Affidavit (the "IFP motion"), ECF No. 4, which has been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A). Based on my review of the IFP application and the prisoner trust fund account statement, I conclude that Plaintiff has satisfied the requirements of 28 U.S.C. § 1915(a)(1); accordingly, if the complaint survives screening, I will grant the IFP motion and calculate the initial filing fee that must be paid before the case may proceed. However, because of the IFP application, this case is subject to preliminary screening under 28 U.S.C. § 1915(e)(2)(B). For the reasons that follow, I find that the complaint fails to state a claim. Further, because I find that Plaintiff's complaint is

[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).

"patently meritless and beyond all hope of redemption," I recommend summary dismissal without leave to amend. Brown v. Rhode Island, 511 F. App'x 4, 5 (1st Cir. 2013) (per curiam).

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 Fed. R. Civ. P. 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.

Plaintiff's pleading invokes § 1331 jurisdiction based on the False Claims Act, 31 U.S.C. § 3729, *et seq.* ("FCA"). The complaint's case caption calls it a "False Claims Tort Complaint." ECF No. 1 at 1. According to the complaint, a scheme at the Rhode Island Department of Corrections ("DOC") is resulting in an "[u]nauthorized loss of good-time" for prisoners, which "lengthens incarceration, adversely affecting the DOC's claims." Id. at 3. The complaint alleges that the "purpose of this conspiracy is perpetual appropriation of funds for overtime payments through coordinated harassment and intentional understaffing." Id. Consequently, Plaintiff claims, "Defendants filed false reports in violation of department policy to secure payment from the U.S. and The State of R.I. for each inmate affected by loss of good-time." Id. The complaint does not allege that Plaintiff himself was deprived of good time credit to which he was entitled.

Pro se litigants are not permitted to bring *qui tam* lawsuits under the FCA. Nasuti v. Savage Farms Inc., No. 14-1362, 2015 WL 9598315, at *1 (1st Cir. Mar. 12, 2015); Lu v. Samra, Civil Action No. 17-cv-10119-IT, 2018 WL 283891, at *1 (D. Mass. Jan. 3, 2018). They are expressly limited by statute to bringing only their own claims: "In all courts of the United States

the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654. Because a *qui tam* action is brought in the government's name, a *pro se* party may not pursue a *qui tam* matter. See Timson v. Sampson, 518 F.3d 870, 873-74 (11th Cir. 2008) (per curiam) (plaintiff "could not maintain a *qui tam* suit under the FCA as a *pro se* relator"). Accordingly, the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because it purports to state only a relator claim, which is not viable for a *pro se* litigant. See United States, ex rel. Lu v. Gamboa-Ruiz, Civil Action No. 1:18-cv-10105-IT, 2019 WL 608837, at *2 (D. Mass. Feb. 13, 2019) (dismissing *pro se* FCA *qui tam* action under Fed. R. Civ. P. 12(b)(6)).[2]

The remaining question for the Court is whether Plaintiff should be afforded leave to amend to allege a due process violation as to his own deprivation of good time credit. There are two problems with this proposition. First, the complaint does not assert that Plaintiff is a victim of the alleged conspiracy. Second, and fatal to an as-yet unstated claim, even if Plaintiff were allowed an opportunity to amend and assert a claim based on his own loss of good time credit, the amended pleading would still fail to state a claim because it is well settled that "[t]he award of good time credit in Rhode Island is discretionary, . . . so no liberty interest attaches." DuPonte v. Wall, 288 F. Supp. 3d 504, 510 n.3 (D.R.I. 2018) (citing Leach v. Vose, 689 A.2d 393, 398 (R.I. 1997) ("there is no liberty interest created by our good time and industrial time credit statute since it is completely discretionary")).

Based on the foregoing, I recommend dismissal of the complaint for failure to state a claim; because I find Plaintiff would not be able to reframe his complaint based on due process, I recommend summary dismissal of the complaint for failure to state a claim. 28 U.S.C. §

[2] This case is on appeal to the First Circuit.

1915(e)(2)(B)(ii). If this recommendation is adopted, this case will serve as Plaintiff's second strike pursuant to 28 U.S.C. § 1915(g).[3] If the complaint survives screening, I will grant the IFP motion and calculate the initial filing fee that must be paid before the case may proceed.

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
May 24, 2019

[3] Under federal law, "IFP status is not available to a prisoner who has brought three or more cases that were dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted." Martinez v. Duffy, C.A. No. 18-21WES, 2018 WL 1224458, at *1 (D.R.I. Mar. 8, 2018). Plaintiff is cautioned that he could become a "three-striker" who will be barred from IFP status except in extreme circumstances as long as he remains a prisoner. His first strike is the Court's dismissal of all claims in a prior case for failure to state a claim; after he appealed the Court's refusal to alter its judgment, the First Circuit affirmed. Tavares v. Kilmartin, C.A. No. 18-08JJM, ECF Nos. 7, 22. While not yet a strike because it is on appeal, Plaintiff has another case where the Court dismissed every claim under Fed. R. Civ. P. 12(b)(6). Tavares v. R.I. Dep't of Corrs., C.A. No. 17-550JJM, ECF Nos. 42, 44.