

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

CORNELIUS E. PEOPLES,

Plaintiff,

v.

**CORRECTIONS CORPORATION OF
AMERICAN, et al.,**

Defendants.

CIVIL ACTION

No. 02-3298-CM

MEMORANDUM AND ORDER

This matter comes before the court on defendants Corrections Corporation of America (CCA), Fred Lawrence and Andre Ford's Motion to Dismiss (Doc. 8) and defendants CCA, Lawrence, Ford, Jaequelyn Banks, Bruce Roberts and Gary Fuller's Motion to Dismiss (Doc. 19).

I. Background

Defendant CCA is a private Maryland corporation under contract with the United States Marshals Service (USMS) to detain and house federal prisoners. CCA and its employees are private parties. Plaintiff is a federal prisoner in the custody of the USMS being detained at CCA. Plaintiff filed this action on or about September 16, 2002, claiming that the court has jurisdiction over the parties and the subject matter in this action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Then, on June 16, 2003, plaintiff amended his complaint to remove 42 U.S.C. § 1983 as a jurisdictional base and substitute 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiff is seeking relief for alleged violations of his federally protected rights for 1) being placed in segregation upon

his arrival at CCA, 2) being kept in segregation under order of the USMS, 3) being denied unmonitored phone calls to his attorney, and 4) being denied access to a law library or legal resources.

Defendants argue that they are entitled to dismissal both on jurisdictional grounds and because plaintiff has failed to state a claim on which relief can be granted. First, defendants argue that the court lacks subject matter jurisdiction because defendants are private parties, not federal actors, as required by *Bivens*. Second, on the merits, defendants argue that plaintiff has not stated any violations that give rise to a due process claim because defendants were using CCA regulations in determining plaintiff's cell assignment, monitoring his phone calls, and providing him access to the law library or other legal resources.

II. Standards

A. Dismissal Under Fed. R. Civ. P. 12(b)(1)

The court may only exercise jurisdiction when specifically authorized to do so, *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994), and must “dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking.” *Scheideman v. Shawnee County Bd. of County Comm'rs*, 895 F. Supp. 279, 281 (D. Kan. 1995) (quoting *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)); Fed. R. Civ. P. 12(h)(3). The party who seeks to invoke federal jurisdiction bears the burden of establishing that such jurisdiction is proper. *Basso*, 495 F.2d at 909. When federal jurisdiction is challenged, plaintiff bears the burden of showing why the case should not be dismissed. *Jensen v. Johnson County Youth Baseball League*, 838 F. Supp. 1437, 1439-40 (D. Kan. 1993).

A facial attack on subject matter jurisdiction challenges the sufficiency of the complaint. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Therefore, in its review, the court must accept the allegations in the complaint as true.

B. Dismissal Under Fed. R. Civ. P. 12(b)(6)

The court will dismiss a cause of action for failure to state a claim only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998), or when an issue of law is dispositive. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The court accepts as true all well-pleaded facts, as distinguished from conclusory allegations, *Maher*, 144 F.3d at 1304, and all reasonable inferences from those facts are viewed in favor of the plaintiff. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984).

The court is aware that plaintiff in this case appears pro se. Accordingly, while the court should liberally construe a pro se plaintiff's complaint, "the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations." *Northington v. Jackson*, 973 F.2d 1518, 1521 (10th Cir. 1992).

III. Analysis

A. Jurisdiction

Plaintiff asserts jurisdiction under 28 U.S.C. §1331 and *Bivens*. Section 1331 gives the district court jurisdiction over civil actions "arising under the Constitution, laws or treaties of the United States." Thus, the jurisdictional question turns on whether federal law, such as *Bivens*, provides a cause of action.

In *Bivens*, the United States Supreme Court recognized an implied private remedy for damages for violation of the Fourth Amendment by “a federal agent acting under color of his authority.” 403 U.S. at 389. The Supreme Court later extended *Bivens* to provide a damages remedy for violation of the Fifth Amendment Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), and violation of the guarantee against cruel and unusual punishment under the Eighth Amendment. *See Carlson v. Green*, 446 U.S. 14, 18 (1980). In *Carlson*, the Supreme Court stated that “*Bivens* established that victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right.” 446 U.S. at 118.

Defendants point out that CCA is a private corporation performing under contract with the USMS. Defendants argue that this relationship does not make CCA and its employees federal agents for purposes of *Bivens*. In a case addressing the very same issue, Judge Rogers of this court stated:

The difficult question presented by this complaint is whether or not jurisdiction lies under *Bivens* to sue a private corporation and employees of that corporation who operate a prison pursuant to a contract with the United States. Jurisdiction would clearly lie for claims involving unconstitutional actions taken by federal officials, persons actually employed by the United States, or agents of the United States. Plaintiff’s jurisdictional assertions are based upon an unfounded assumption that the CCA employees who are nothing more than employees of an independent contractor were acting under color of federal authority. Such an assumption is certainly not settled law. The Tenth Circuit Court of Appeals has declined to take a position as to whether a private defendant may be subject to *Bivens* liability and noted a split among the circuit courts on this issue. This court follows the example of the Tenth Circuit by assuming *arguendo* that a *Bivens* action is available and proceeds to examine the sufficiency of the complaint.

Hill v. Corr. Corp. of Am., 14 F. Supp. 2d 1235, 1238 (D. Kan. 1998) (citations omitted). Judge Rogers subsequently sustained the motion to dismiss for failure to state a claim on the merits.

In *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), the Supreme Court addressed part of the issues Judge Rogers raised in *Hill*. In *Malesko*, a federal prisoner sued Correctional Services Corporation (CSC), a private corporation under contract with the Federal Bureau of Prisons to house federal prisoners and detainees. While Malesko was in CSC custody, CSC employees forced him to climb stairs to his fifth floor living quarters even though he had a known heart condition. Malesko had a heart attack, fell, and sustained injuries. Malesko brought a *Bivens* action against CSC for actual and punitive damages. The Supreme Court refused to extend *Bivens* liability to CSC, and found that imposing liability on private prison facilities is a question for Congress, not the courts, to decide. Therefore, *Malesko* clearly precludes plaintiff's due process claims against CCA under *Bivens*.¹ The court thus grants defendants' Motion to Dismiss plaintiff's claims against CCA.

Defendants assert that *Malesko* also establishes that plaintiff cannot pursue a *Bivens* claim against individual CCA employees. However, in *Malesko*, the Supreme Court did not address whether a *Bivens* action might lie against individual employees of a federal contractor. The Supreme Court pointed out that inmates in plaintiff's position have alternative remedies to *Bivens* claims, such as state tort remedies and full access to remedial mechanisms established by the Bureau of Prisons, including suits in federal court for injunctive relief and grievances filed through the Bureau of Prison's Administrative Remedy Program. *Id.* at 74. The Supreme Court noted:

In 30 years of *Bivens* jurisprudence, we have extended its holding in that case only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have

¹ In plaintiff's first complaint, he asserted a cause of action under 28 U.S.C. § 1983. In plaintiff's amended complaint, he removed the reference to jurisdiction under § 1983. To the extent that plaintiff still seeks to hold defendants liable under § 1983, defendants correctly point out that plaintiff does not assert that defendants acted under color of state law as required to maintain an action under § 1983.

acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.

Id. at 70. Therefore, under *Malesko*, when a plaintiff has an alternative remedy to a *Bivens* action, the Supreme Court would be unlikely to allow a *Bivens* claim against an individual employee of a federal contractor. *See, e.g., Peoples v. CCA Det. Ctr.*, No. Civ.-A. 03-3129-KHV, 2004 WL 74317 *7 (D. Kan. Jan. 15, 2004) (dismissing prisoner's claim that individual employees of privately run federal correctional facility violated his right to be free from cruel and unusual punishment for lack of subject matter jurisdiction where other remedies, including state tort action, were available).

Considering the restrictive standards the Supreme Court set forth for maintaining a *Bivens* action in *Malesko*, this court finds that it is unlikely plaintiff could maintain a *Bivens* action against the individual CCA employees, especially when alternative remedies are available to him. *See id.* However, because the Tenth Circuit has not fully addressed this issue, the court will assume *arguendo* that a *Bivens* action against the individual employees is available and will examine the sufficiency of plaintiff's complaint.

B. Plaintiff's Complaint

Plaintiff claims that defendants violated his due process rights as a pretrial detainee by placing him in segregation upon his arrival at CCA and keeping him in segregation, denying him access to a law library or legal resources, and denying him unmonitored phone calls to his attorney. Claims involving conditions of confinement brought by pretrial detainees are analyzed under the Due Process Clause of the Fourteenth Amendment. *See Sanders v. Hopkins*, 131 F.3d 152 (10th Cir. 1997) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 & n. 16 (1979)). The due process clause prohibits a pretrial detainee from being subjected to conditions which "amount to punishment or otherwise violate the Constitution." *Bell*, 441 U.S. at 537. "[I]f

a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’” *Id.* at 539. Absent a showing that prison officials intended to punish, the determination of whether the restriction is punitive or incidental to a legitimate governmental purpose will turn on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].” *Stevenson v. Smith*, 980 F.2d 741 (10th Cir. 1992) (citing *Bell*, 441 U.S. at 538). Maintaining jail security and effectively managing a detention facility are valid objectives which may justify the imposition of certain restrictions. *Bell*, 441 U.S. at 540.

Plaintiff’s first claim is that his assignment to administrative segregation violated his due process rights. A pretrial detainee may be placed in isolation to maintain prison discipline. A detention center has a legitimate interest in segregating individual inmates from the general population for nonpunitive reasons, such as where there is a threat to the safety and security of the institution. *Brown-El v. Delo*, 969 F.2d 644, 647 (8th Cir. 1992). *See also Bell*, 441 U.S. at 540 (“Restraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.”). Moreover, “prison administrators should be accorded . . . wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . . ‘[I]n the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.’” *Id.* at 547-48 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

Plaintiff's complaint alleges that he was assigned to administrative segregation upon his arrival at CCA because of lack of bed space, and that he remained in administrative segregation by order of the USMS. Plaintiff contends that he was placed in segregation because of the USMS and CCA officials' perception that plaintiff was an escape risk and because plaintiff had a high profile case. Plaintiff contends that the information regarding plaintiff being an escape risk was in his file from a previous jail. Plaintiff also contends that defendants have given several different reasons for his continued placement in administrative segregation - including that he is a violent inmate.

It is clear from plaintiff's pleadings that he participated in a hearing concerning his placement in segregation during which he was told the reason he had been placed in administrative segregation and given the opportunity to respond. Plaintiff's pleadings also demonstrate that he received a written statement of the evidence relied on and the reasons for his continued placement in administrative segregation, including the fact that he is considered an escape risk. Plaintiff's pleadings further demonstrate that he has filed grievances regarding his placement in administrative segregation on multiple occasions, to which CCA employees have responded with the reasons for his placement. Moreover, although plaintiff claims that CCA employees' goal in placing him in administrative segregation is to punish him, plaintiff cites no facts in support of this assertion. A review of the facts plaintiff has alleged does not show that CCA and its employees intended to punish plaintiff by placing him in administrative segregation. Rather, it appears that CCA authorities acted in furtherance of legitimate penal objectives of safety and security of the institution in placing plaintiff in administrative segregation, notably, on the advice of the USMS and based on concerns that plaintiff is an escape risk. Therefore, the court is unable to find any due process violation from plaintiff's assignment to and placement in administrative segregation.

Plaintiff next claims that defendants have violated his due process rights by depriving him of legal research materials, and thus, adequate access to the courts. Plaintiff claims that CCA provides him access to legal materials through defendant Gary Fuller, who is an attorney, but that he is limited to obtaining case law for which he has exact citations. Plaintiff's pleadings demonstrate that he contacted Fuller and requested various resources from him. Plaintiff does not contend that Fuller failed to provide him with specific cases he requested. Rather, plaintiff contends that such a system, in lieu of access to a law library, is insufficient and violates his due process right of access to the courts.

Pretrial detainees have a constitutional right to adequate, effective and meaningful access to the courts. *Love v. Summit County*, 776 F.2d 908, 912 (10th Cir. 1985). Prison officials are required to protect the constitutional right of prisoners to access to the courts under the Fifth and Fourteenth Amendments. *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). Prison officials can safeguard that access either by providing inmates an adequate law library or adequate assistance from persons trained in the law. *Id.* at 828. Prisoners are entitled to meaningful, but not total or unlimited access. *Id.* at 823. A prisoner's right of access "has not been extended . . . to apply further than protecting the ability of an inmate to prepare a petition or complaint." *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974). Prison officials cannot affirmatively hinder a prisoner's attempts to prosecute a nonfrivolous claim. *Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir. 1992). "The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts." *Arney v. Simmons*, 26 F. Supp. 2d 1288, 1296 (D. Kan. 1998). To allege an unconstitutional restriction on the right of access under *Bounds*, plaintiff must plead and prove actual injury by showing that the denial of legal resources hindered his efforts to pursue a

particular case. *See Lewis v. Casey*, 518 U.S. 343, 351-352 (1996); *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978); *Arney*, 26 F. Supp. 2d at 1296.

Plaintiff does not allege that he is being denied total access to legal assistance. Plaintiff does not claim that CCA obstructed in any way his attempt to prosecute a claim, and he admits that CCA provided him with access to a person trained in the law, Mr. Fuller, and that he consulted with Mr. Fuller and requested case law from him. Plaintiff has not alleged that he has missed court dates, been unable to make timely legal filings, been denied legal assistance to which he was entitled, or lost a case which could have been won. *See Arney*, 26 F. Supp. 2d at 1296. In fact, plaintiff appears to have been afforded the necessary resources to file the complaint in this action and has submitted additional pleadings that contain case law citations and analysis of relevant case law. The court concludes that CCA's provision of a person trained in the law instead of a law library has afforded plaintiff the necessary resources to prosecute his claims. The court finds that plaintiff has failed to allege an actual injury resulting from the alleged denial of legal resources, and thus, his claim that defendants violated his due process right of access to the courts cannot withstand defendants' motion to dismiss.

Finally, plaintiff claims that defendants have violated his due process rights by refusing to provide him an unmonitored telephone on which to make telephone calls to his attorney regarding his pending criminal case. Defendants claim that the only way CCA limited plaintiff's use of inmate telephones was by informing him that inmate telephones are randomly monitored in an effort to deter inmates from using facility phones for criminal or other improper purposes, pursuant to CCA policy. However, plaintiff was also told that CCA policy is to refrain from monitoring or recording calls from attorney's phones when the attorney has properly

requested blocking. Defendants contend that plaintiff was not prohibited from contacting his attorney by telephone and requesting that his attorney arrange for unmonitored phone calls to plaintiff.

The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions. *Fillmore v. Ordonez*, 829 F. Supp. 1544, 1563-64 (D. Kan. 1993); *see also Martin v. Tyson*, 845 F.2d 1451, 1458 (7th Cir. 1988) (pretrial detainees' due process rights not violated by limitations on telephone access). The Sixth Amendment does not require in all instances full and unfettered contact between an inmate and counsel. *See Mann v. Reynolds*, 46 F.3d 1055, 1060 (10th Cir. 1995).

Plaintiff does not claim that CCA policy allowed monitoring of all inmate consultations with attorneys. Moreover, plaintiff is silent regarding whether he ever contacted his attorney to arrange for blocking of calls from his attorney's phones. The court finds that CCA's policy of randomly monitoring inmate phone calls is reasonable and related to its legitimate penal objectives of safety and security in managing the institution. Plaintiff has the option to contact his attorney and arrange for unmonitored phone calls. Plaintiff has not alleged that he contacted his attorney and CCA has failed to honor his attorney's request for unmonitored phone calls. Therefore, the court finds no violation of plaintiff's due process rights as a result of CCA's inmate telephone policy and its application to plaintiff. *See Arney*, 26 F. Supp. 2d at 1297 (finding that automatic monitoring of attorney calls on facility phones did not infringe on prisoner's rights when prisoners could make unlimited non-monitored calls on inmate phones).

Even accepting as true all well-pleaded facts, the court finds that plaintiff has alleged no facts in support of his due process claims that would entitle him to relief.

IT IS THEREFORE ORDERED that defendants' Motions to Dismiss (Docs. 8 and 19) are hereby granted. This case is dismissed.

SO ORDERED.

Dated this 26th day of March 2004, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge