NOT RECOMMENDED FOR PUBLICATION

No. 19-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 16, 2020
DEBORAH S. HUNT, Clerk

ELVERT S. BRISCOE, JR.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
GARY C. MOHR, ODRC Director, et al.,	)	THE NORTHERN DISTRICT OF
	)	OHIO
Defendants-Appellees.	)	
	)	
	)	

O R D E R

Before: COOK and THAPAR, Circuit Judges; HOOD, District Judge.*

Elvert S. Briscoe, Jr., an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his complaint brought pursuant to 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In October 2018, Briscoe brought this action against Director of the Ohio Department of Rehabilitation and Correction (ODRC) Gary C. Mohr, Warden of the Grafton Correctional Complex LaShann Eppinger, Deputy Wardens Keith Foley and Jennifer Gillece, Institutional

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Investigator Steve Weishar, Rules Infraction Board Chairman Nicholaus Costello, and inmate Mark Hurayt. Briscoe's complaint originates from a 2016 Rules Infraction Board decision finding him guilty of attempting and planning an escape, which resulted in a raised security status and a transfer to a maximum-security prison. He alleged that the charge was based on false allegations from fellow inmate Hurayt after Briscoe had reported Hurayt for inappropriate use of a computer and for making a false report. He therefore claimed that: (1) his right to due process of law was violated by the filing of a false charge against him, the denial of a fair and impartial hearing, and the lack of evidence supporting his disciplinary violation; (2) the disciplinary charges were filed against him out of retaliation for his submitting complaints concerning Hurayt; (3) his right to equal protection was violated because the ODRC defendants conducted a more thorough investigation of the charge against Briscoe than they conducted for his claim that Hurayt provided false information; and (4) his right to be free from cruel and unusual punishment was violated when he was restrained, temporarily placed in more restrictive housing, and transferred to a maximum-security prison, and when the ODRC defendants failed to protect him from Hurayt's purportedly false allegations. The district court sua sponte dismissed the complaint for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B).

On appeal, Briscoe argues that he has offered sufficient allegations in the complaint to survive dismissal and reiterates his due process, retaliation, equal protection, and excessive-force claims. He does not argue on appeal, and therefore abandons, any state-law claim for the intentional infliction of emotional distress. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005).

We "review a district court's decision to dismiss under 28 U.S.C. §§ 1915(e), 1915A, and 42 U.S.C. § 1997e *de novo*." *Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008). "The Prison Litigation Reform Act ("PLRA") requires district courts to screen and dismiss complaints that are frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief." *Id.* at 572 (citing 28 U.S.C. § 1915A(b)); *see also* 28 U.S.C. § 1915(e)(2)(B); 42 U.S.C. § 1997e(c). We review the dismissal of claims at screening under the standard set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Hill v.*

Lappin, 630 F.3d 468, 470-71 (6th Cir. 2010). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Procedural Due Process

The Fourteenth Amendment's Due Process Clause protects individuals against the deprivation of life, liberty, or property without due process. "[T]hose who seek to invoke its procedural protections must establish that one of these interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). A prison disciplinary action does not implicate a liberty interest requiring due process safeguards unless the punishment imposed will "inevitably" affect the duration of an inmate's sentence or inflict an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484, 487 (1995). The Constitution does not provide a liberty interest in remaining free from transfer to a higher security facility with more onerous conditions. *Austin*, 545 U.S. at 221-22; *Meachum v. Fano*, 427 U.S. 215, 225 (1976). However, the Supreme Court has held that transfer to a maximum-security facility with highly restrictive conditions of confinement, a long duration, and an attendant disqualification for parole consideration can together be enough to create a liberty interest. *See Austin*, 545 U.S. at 223-24.

Briscoe does not establish that the decision to elevate his security classification and transfer him to a maximum-security facility implicated a constitutionally protected liberty interest. We have held that a maximum-security classification and a transfer to a less desirable facility does "not constitute atypical and significant hardship because heightened security status is one of the ordinary incidents of prison life." *Workman v. Wilkinson*, 23 F. App'x 439, 440 (6th Cir. 2001). The placement does not inevitably effect the duration of Briscoe's sentence because the effect of Briscoe's security classification due to his misconduct "on his chances for parole is a collateral consequence and does not create a liberty interest," and the parole board was not forbidden by law from granting him parole due to his misconduct. *Id.* at 441. Briscoe's situation therefore does not fall under the exception carved out by the Supreme Court in *Austin*. Briscoe's attempts to create a protected liberty interest by arguing that the parole board was entitled to review accurate

misconduct reports or that he could potentially be indicted for additional crimes stemming from his misconduct do not alter this analysis.

That said, Briscoe also claims that the prison transfer deprived him of certain personal property. Our circuit has yet to resolve whether the "atypical and significant hardship" standard should apply to alleged property interests, and other circuits are split on the question. *See Pickelhaupt v. Jackson*, 364 F. App'x 221, 224–26 (6th Cir. 2010) (collecting cases). Neither the district court nor the defendants have had the chance to address this issue.

Nor can we say—at least at this stage of the proceedings—that Briscoe received adequate process. Specifically, Briscoe alleged that the prison prevented him from calling certain witnesses. *See King v. Wells*, 760 F.2d 89, 93 (6th Cir. 1985). To be sure, prisons have wide leeway to exclude witnesses for a variety of reasons. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). But at this point, we do not know what reason (if any) the prison had for excluding these witnesses. *See Ponte v. Real*, 471 U.S. 491, 497 (1985) (noting that Due Process requires prisons to offer some explanation for their refusal to allow a witness). Accordingly, we leave this claim to the district court on remand. *See United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015).

Equal Protection

Briscoe claims that his equal protection rights were violated, arguing that he was similarly situated to Hurayt because allegations had been made against them both, but the ODRC defendants had pursued Hurayt's claims that Briscoe was planning an escape, but did not vigorously pursue Briscoe's allegations that Hurayt had falsely reported Briscoe. The Equal Protection Clause prohibits "invidious discrimination against similarly situated individuals[.]" *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (quoting *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)). "The states cannot make distinctions which either burden a fundamental right, target a suspect class, or intentionally treat one differently from others similarly situated without any rational basis for the difference." *Radvansky*, 395 F.3d at 312. Briscoe did not allege that he was similarly situated to Hurayt in all respects, as Briscoe's charge involved a risk to prison security through an escape plan, whereas Hurayt's charge involved the possession of a contraband flash drive, and Briscoe had accused him of merely making a false report. *See*

Harbin-Bey v. Rutter, 420 F.3d 571, 577 (6th Cir. 2005). This is a rational basis for the disparate treatment of the two accusations, and Briscoe does not state a plausible equal protection claim.

Excessive Force

Briscoe claims that the defendants' actions of handcuffing and placing him in more restrictive custody constituted excessive force in violation of the Eighth Amendment. To prevail on this claim, he must show that the defendants used force to cause "an unnecessary and wanton infliction of pain." *Cordell v. McKinney*, 759 F.3d 573, 580 (6th Cir. 2014) (quoting *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011)). The Supreme Court has told us that "'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). In this case, Briscoe's complaint provides the very penological reasons that the officers detained him—because a fellow inmate said that Briscoe was planning to escape and because the prison needed to transport him to another prison. Of course, Briscoe alleged that the inmate lied about the escape plan. But the fact that inmate may have lied does not translate the handcuffing or higher security decision into cruel and unusual punishment. Without more, Briscoe has not stated an Eighth Amendment claim.

Retaliation

Briscoe claims that the defendants violated his substantive due process rights and interfered with his First Amendment right to report misconduct and file grievances. "To state a successful case of general retaliation, a prisoner must establish 'an egregious abuse of governmental power' or behavior that 'shocks the conscience.'" *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000) (quoting *Thaddeus-X v. Blatter*, 175 F.3d 378, 387 (6th Cir. 1999) (en banc)). Alternatively, in order to state a claim that he was retaliated against for exercising his First Amendment rights, "a plaintiff must show that (1) he engaged in protected conduct; (2) the defendant took an adverse action against him 'that would deter a person of ordinary firmness from continuing to engage in that conduct'; and (3) that the adverse action was taken (at least in part) because of the protected conduct." *Thomas v. Eby*, 481 F.3d 434, 440 (6th Cir. 2007) (quoting *Thaddeus-X*, 175 F.3d at 394). If the plaintiff alleges a First Amendment retaliation claim, then the claim should be

analyzed under that framework rather than the general retaliation framework. *See Thaddeus-X*, 175 F.3d at 387–88.

The district court incorrectly concluded that Briscoe's retaliation claim was blocked by the finding of guilt in Briscoe's disciplinary proceedings. Although guilt of misconduct may be relevant evidence against a retaliation claim on summary judgment, we have rejected the "checkmate doctrine" as an absolute bar on a retaliation claim. *See Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018).

Briscoe's allegations state a claim for First Amendment retaliation. Specifically, Briscoe alleged that the defendants brought the escape charge against him because he had reported Hurayt's misconduct and filed grievances requesting that charges be brought against Hurayt for making false accusations. He claimed that his increased security level and transfer resulted in the loss of property and subjected him to several hardships associated with being housed at a maximum-security prison. He also alleged that the misconduct finding affected his chances of being granted parole. Although transfers to the general population of another prison are not typically adverse actions, *see Smith v. Yarrow*, 78 F. App'x 529, 543 (6th Cir. 2003), such "a transfer can be an adverse action if that transfer would result in foreseeable, negative consequences to the particular prisoner," *Hill*, 630 F.3d at 474, such as making it harder for the prisoner to meet with his lawyer or move him far away from his family, *see Siggers-El v. Barlow*, 412 F.3d 693, 701-02 (6th Cir. 2005); *Pasley v. Conerly*, 345 F. App'x 981, 985 (6th Cir. 2009). The alleged consequences of Briscoe's misconduct finding arguably could deter a person of ordinary firmness from continuing to engage in protected conduct. *See Hill*, 630 F.3d at 473. He claimed that the defendants took this action due to an improper relationship between Foley and Hurayt; to prevent Briscoe from testifying as to Hurayt's conduct; to save face from being "duped"; and to prevent Hurayt from revealing a plot between certain ODRC defendants to have another staff member fired. Briscoe claimed that these allegations were supported by letters and emails written by Hurayt and by a statement made by Weishar to another prisoner. Assuming the truth of Briscoe's allegations, as we must do at the dismissal stage, he has sufficiently stated a claim for retaliation.

Accordingly, we **AFFIRM** the district court's dismissal of Briscoe's equal protection and excessive-force claims. We **VACATE** the district court's dismissal of Briscoe's procedural due process and retaliation claims and **REMAND** the case to the district court for further proceedings.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELVERT S. BRISCOE, JR., Plaintiff, vs. GARY MOHR, ODRC DIRECTOR, *et al.*, Defendants.	CASE NO. 1:18 CV 2417 OPINON & ORDER

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Introduction

Pro se plaintiff Elvert S. Briscoe, Jr., an Ohio inmate incarcerated in the Toledo Correctional Institution, has filed this civil rights action under 42 U.S.C. § 1983 against Ohio Department of Rehabilitation and Correction (ODRC) Director Gary Mohr, and multiple officials and a fellow inmate at the Grafton Correctional Complex (GCC) where he was previously incarcerated. (Doc. No. 1.) In addition to Director Mohr, the plaintiff sues GCC Warden Lashann Eppinger, Deputy Wardens Keith Foley and Jennifer Gillece, Investigator Steve Weishar, Rules Infraction Board Chairman Nicholaus Costello, and inmate Mark "Marcello" Hurayt.

The plaintiff's action pertains to a 2016 Rules Infraction Board (RIB) decision finding him guilty of attempting and planning an escape, which resulted in an increase in his security-level status and transfer to a maximum security prison. The plaintiff has been granted leave to proceed *in forma pauperis* by separate order. For the reasons stated below, his action is dismissed.

Background

The events giving rise to the action occurred while the plaintiff was incarcerated in the Grafton Reintegration Center, which is part of GCC, where the plaintiff was a Program Aid in the

computer lab. The plaintiff alleges that in June 2016, he observed and "counseled" fellow inmate Hurayt (who he identifies in his complaint as a confidential informant, or "CI," for defendants Weishar, Foley, Gillece, and Eppinger) for doing unauthorized legal work on a computer and for using an unauthorized USB flash drive. (*Id.* at ¶¶ 14-17.) The CI was removed from the computer lab as result of the plaintiff's intervention and, a month later, was found to be in possession of the unauthorized flash drive and disciplined. The plaintiff alleges the CI told prison staff he got the flash drive from the plaintiff in order to get out of his contraband ticket. The plaintiff "was stripped searched and shookdown" as a result of the CI's accusation, but he was cleared when no contraband was found in his possession. (*Id.* at ¶ 20.)

The plaintiff alleges he told prison staff the CI made the false accusation against him in retaliation for his having had the CI removed from the computer lab. And he alleges that because he feared the CI was "going to make another false accusation" against him, he sent a kite to defendant Weishar on July 11, 2016, asking that the CI be charged with giving a false report. (*Id.* ¶¶ 21, 22.) No action was taken by prison officials in connection with this request, but on July 13, 2016, defendant Weishar placed the plaintiff and three other inmates under investigation as result of other, confidential information the CI had provided to prison officials: that the plaintiff and the three other inmates were planning an escape involving google maps and rubber gloves. (*Id.* at ¶ 23.)

The plaintiff filed additional kites in which he asserted that the CI's escape allegations against him were false and retaliatory and asking to meet with defendants Weishar, Eppinger, Foley, and Gillece in order to present all of the facts. He also asked that all the parties involved be required to take lie detector or voice stress analysis tests. (*See id.* at ¶ 24; Doc. No. 1-4 at 4, 6, 8.)

On September 1, 2016, the plaintiff and the three other implicated inmates took Computer Voice Stress Analysis tests (CVSAs). (Doc. No. 1 at ¶ 41.) On October 3, 2016, the plaintiff was informed of the results of the tests and charged with attempting or planning escape in a written conduct report. (*See* Doc. No. 1-3.) The report, signed by defendant Weishar, stated that an investigation was undertaken to verify the information provided by the CI regarding a plan to escape, and that the CI's CVSA showed no deception while the plaintiff "showed deception when asked about a plan to breach the security fence." (*Id.*)

An RIB hearing on the charges was held on October 7, 2016 before RIB Chairman Costello and Kai Adams. (Doc. No. 1 at ¶ 57.) Although the plaintiff "was not allowed to question about CVSAs" at his hearing, he alleges "ample evidence was put in the record that CVSAs are unreliable." (*Id.* at ¶ 58.) In addition, he alleges he "presented testimony and documents." (*Id.* at ¶ 59.) After a "split 1-1 vote" on the charges, defendant Eppinger appointed defendant Foley to the RIB panel, who found the plaintiff guilty. (*Id.* at ¶¶ 60, 61.) The RIB report states the plaintiff was found guilty on the basis of administered CVSA tests. (Doc. No. 1-5.) As a result of the conduct violation, the plaintiff's security-level status was increased, and he was transferred to a maximum security prison (the Southern Ohio Correctional Facility) from November 7, 2016 to November 7, 2017, and deprived of other privileges and property. (Doc. No. 1 at ¶¶ 68, 80-82.)

The plaintiff appealed the RIB's decision, challenging the partiality of defendant Foley, the "fundamental fairness" of using CVSAs, and the refusal of the RIB to hear other e-mails and evidence he had requested. Defendants Eppinger and Mohr denied the plaintiff's appeals. (*Id.* at ¶ 62.)

The plaintiff filed this action on October 18, 2018, contending he was wrongly found guilty of the conduct charges. He alleges defendants Weishar, Eppinger, Foley, Gillece, Costello, and the CI violated his "Substantive and Procedural Due Process rights under the Fourteenth

Amendment" in connection with the charges, his RIB hearing, and his subsequent transfer to the Southern Ohio Correctional Facility. In addition, he alleges that the prison official defendants unlawfully retaliated against him by bringing the charges after he reported retaliation by the CI, violated his Equal Protection rights by investigating the CI's allegations against him but not his against the CI, and failed to protect him from the CI's false "attacks." He also alleges he was subjected to cruel and punishment when he was forcefully placed in restrictive housing pending investigation on the conduct charges and transferred and confined in the maximum security Southern Ohio Correctional Facility. (*See id.* at ¶¶ 103-117, "Legal Claims.") In addition to declaratory and monetary relief, the plaintiff seeks injunctive relief ordering that the defendants "cease and desist" the use of CVSAs, reinstate him to Level 1 security status and the Video Apprenticeship Program, transfer him to an appropriate Level 1 facility, and clear his disciplinary record of "any and all references of a plan to escape." (*Id.* at ¶ 121.) He has filed a Motion for an "Order to Show Cause for a Preliminary Injunction" requesting the same injunctive relief. (Doc. No. 3.)

Standard of Review

Although *pro se* pleadings are liberally construed and held to less stringent standards than formal pleadings drafted by lawyers, *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011), federal district courts are required under 28 U.S.C. § 1915(e)(2)(B) to screen all *in forma pauperis* actions filed in federal court, and to dismiss before service any such action that the Court determines is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *Hill v. Lappin*, 630 F.3d 468 (6th Cir. 2010). To survive a dismissal for failure to state a claim under § 1915(e)(2)(B, a *pro se* complaint must contain sufficient factual matter, accepted as true, to state claim to relief that is plausible on its face. *Hill*, 630 F.3d at 470-71 (holding that the dismissal

standards articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) govern dismissals for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)).

Discussion

In order to state a claim for relief under § 1983, a plaintiff must allege that a person acting under color of state law deprived him of a right secured by the Constitution or laws of the United States. *Waters v. City of Morristown*, 242 F.3d 353, 358-59 (6th Cir. 2001). Upon review, the court finds that the plaintiff's complaint fails to allege any plausible constitutional claim on which he may be granted relief against any defendant under § 1983.

First, the plaintiff has not alleged any plausible procedural due process claim. A prison disciplinary proceeding does not give rise to a constitutionally-protected liberty interest triggering constitutional due process protections unless the discipline imposed results in a withdraw of good time credits or constitutes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995). The prison discipline of which the plaintiff complains does not trigger constitutional due process protection. The Sixth Circuit has made clear that sentences imposed on a prisoner stemming from an RIB disciplinary conviction and resulting in an increase in the plaintiff's security classification do not constitute an "atypical and significant hardship" in relation to the ordinary incidents of prison life. *See, e.g., Workman v. Wilkinson*, 23 F. App'x 439, 441, 2001 WL 1450709, at *1 (6th Cir. 2001) (placement of state prisoner on administrative control and in a maximum security classification because of a misconduct offense resulting in transfer to a maximum security prison did not constitute an atypical and significant hardship, and did not infringe on prisoner's due process rights, since heightened security status is one of the ordinary incidents of prison life and the placement did not inevitably affect the duration of prisoner's sentence; the effect of the disciplinary

conviction on prisoner's chances for parole was a collateral consequence and did not create a liberty interest). This is so even where the plaintiff alleges he was falsely accused of the misconduct. *See Jones v. McKinney*, 172 F.3d 48, 1998 WL 940242 at *1 (6th Cir. Dec. 23, 1998) ("even if the disciplinary report was false . . . a prisoner has no constitutionally protected immunity from being wrongly accused"); *Mujihad v. Harrison*, 172 F.3d 49, 1998 WL 940243, at *2 (6th Cir. Dec. 23, 1998) ("the filing of false disciplinary charges against an inmate does not constitute a constitutional violation redressable pursuant to § 1983"). *See also Reeves v. Mohr*, No. 4:11 CV 2062, 2012 WL 275166, at *2 (N. D. Ohio Jan. 31, 2012) (finding no plausible due process claim where a prisoner alleged he was charged with a conduct violation as a result of false allegations by another inmate and was found guilty of the charges on the basis of fabricated polygraph tests).

Even if the discipline of which the plaintiff complains were sufficient to trigger constitutional due process protections, the plaintiff's complaint on its face indicates he received all the process the Constitution requires. Courts have a very limited ability to review prison disciplinary determinations. Prison disciplinary proceedings meet minimal due process requirements if the prisoner is given advance written notice of charges at least 24 hours prior to the disciplinary hearing, a written statement of the evidence relied on and the reasons for the disciplinary action, the prisoner is allowed to call witnesses and present documentary evidence in his defense, and "some evidence" supports the disciplinary board's decision to find him guilty of a particular offense. *See Blevins v. Wilkinson*, 999 F.2d 539, 1993 WL 262469, at *1 (6th Cir. July 8, 1993). The plaintiff's allegations indicate he received all of these protections. Although the plaintiff disagrees with the RIB's reliance on CVSAs, they constitute "some evidence" supporting the RIB's determination. *See Superintendent, Massachusetts Correctional Institution at Walpole*, 472 U.S. 445, 455-56 (1985) (some evidence is "any evidence in the record that could support the

conclusion reached by the disciplinary board"). This court cannot redetermine the plaintiff's guilt or innocence or substitute its own judgment for that of the RIB.

Second, because some evidence supports the RIB's determination that the plaintiff was guilty of the conduct charged, he has failed to allege plausible retaliation and substantive due process claims arising from the disciplinary charges against him. *See, e.g., Metcalf v. Veita*, 156 F.3d 1231, 1998 WL 476254, at *2 (6th Cir. Aug. 3, 1998) ("Where disciplinary charges result in guilty findings supported by some evidence, a prisoner cannot state a claim of retaliation"); *Mujihad v. Harrison*, 172 F.3d 49, 1998 WL 940243, at *2 (6th Cir. Dec. 23, 1998) (holding that a plaintiff's retaliation claim "is blocked by the disciplinary board's findings of guilt" and that he had "not presented sufficient evidence to support a substantive due process claim" because "the only evidence" he offered of retaliation was that disciplinary charges against him "occurred relatively close in time to his filing of grievances").

Third, the plaintiff's complaint does not allege a plausible equal protection claim. Inmates are not a suspect class, and the Equal Protection Clause does not prohibit prison officials from treating different groups of inmates in different ways. *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005). An inmate asserting a violation of equal protection must demonstrate not only that he was treated differently from others similarly situated to him in all respects, but that the different treatment was not rationally related to any legitimate government interest. *Heard v. Quintana*, 184 F. Supp.3d 515, 522 (E.D. Ky. 2016).

The plaintiff complains that prison officials treated the CI more favorably than him because they investigated and pursued the CI's allegations of misconduct against him, but not his allegations that the CI made false reports. However, the plaintiff has not alleged facts plausibly suggesting there was no rational basis for the prison officials' investigatory decisions. The Sixth Circuit has acknowledged that "[t]hreats to prison security presumably demand more immediate

attention that the threats presented by other categories. . . ." *Harbin-Bey*, 420 F.3d at 577. Further, the plaintiff has not alleged facts indicating that he was similarly-situated to the CI in all respects. He and the CI were found guilty and disciplined for different conduct; he for planning and escape and the CI for possessing a contraband flash drive. (*See* Doc. No. 1 at ¶ 71) ("Upon information and belief the CI was charged and placed in seg for possession of a usb after transfer from GCI . . . .").

In short, the plaintiff's allegations are insufficient to support a plausible equal protection claim because they do not support a plausible inference that he was treated differently than the CI without any rational basis, and they indicate he was treated similarly to the three other inmates who were accused of the same misconduct he was.

Fourth, the plaintiff's allegations do not rise to the level of a cognizable Eighth Amendment violation. To prove an Eighth Amendment claim, an inmate must show that he has been deprived of the "minimum civilized measures of life's necessities." *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008), quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Alleging that prison conditions "are restrictive and even harsh" does not suffice because such conditions "are part of the penalty that criminal offenders pay for their offenses against society." *Id.* Instead, "extreme deprivations are required to make out a conditions-of-confinement claim" under the Eighth Amendment because "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citation and internal quotation omitted.) Additionally, not "every malevolent touch by a prison guard gives rise to a federal cause of action." *Id.* "The Eighth Amendment's prohibition of cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." *Id.* at 9–10.

The plaintiff's allegations that he was "forcefully" restrained and placed in restricted housing at GCI pending investigation on escape charges, and that he was subsequently subjected to restrictive and harsh conditions while confined in "one of the most notorious" maximum security prisons (the Southern Ohio Correctional Facility) (*see* Doc. No. 1 at ¶¶ 74, 81) are insufficient to support plausible Eighth Amendment claims. The plaintiff's allegations do not support plausible inferences that he personally was subjected to conditions that deprived him of the minimum civilized measures of life's necessities, or was subjected to excessive force or an unnecessary and wanton infliction of pain in the prison context.

Finally, the plaintiff's complaint fails to state a plausible Eighth Amendment claim on the basis that prison officials failed to protect him from false "attacks" by the CI. To establish an Eighth Amendment violation based on a failure to protect, an inmate must show that a prison official acted with deliberate indifference to his "health or safety." *Bishop v. Hackel*, 636 F.3d 757, 766 (6th Cir. 2011). False accusations of misconduct by a fellow inmate that lead to disciplinary charges, as the plaintiff alleges here, do not present the kind of threat as to which a prison official has a duty to protect an inmate. Rather, the duty to protect extends to known threats to an inmate of physical "violence at the hands of other prisoners." *Id.* "Erroneous allegations of misconduct by an inmate do not constitute a deprivation of a constitutional right." *Reeves v. Mohr*, 2012 WL 275166 at *2.

Conclusion

For all of the reasons stated above, the plaintiff's complaint fails to allege any plausible constitutional claim on which he may be granted relief under §1983, and his complaint is accordingly dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).[1] The plaintiff's motion for an

[1]Because the court finds dismissal against all defendants warranted on the basis that it fails to state any colorable constitutional claim, it is not necessary for the court to address any other,

"Order to Show Cause for a Preliminary Injunction" (Doc. No. 3) is also denied as the court finds the plaintiff has no likelihood of success on the merits of any of his claims. *See Gonzales v. National Bd. of Medical Examiners*, 225 F.3d 620, 632 (6the Cir. 2000) (upholding denial of motion for preliminary injunction where the plaintiff has no likelihood of success on the merits).

Pursuant to 28 U.S.C. § 1915(a)(3), the court further certifies that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Dated: March 8, 2019

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

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further grounds that may exist for dismissing the plaintiff's claims against the various defendants.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ELVERT S. BRISCOE, JR.,	CASE NO. 1:18 CV 2417
Plaintiff,	
vs.	JUDGMENT
GARY MOHR, ODRC DIRECTOR, *et al.*,	
Defendants.	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In accordance with the Court's accompanying Opinion & Order, this action is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Dated: March 8, 2019

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

No. 19-3306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

ELVERT S. BRISCOE, JR.,

Plaintiff-Appellant,

v.

GARY C. MOHR, ODRC DIRECTOR, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: COOK and THAPAR, Circuit Judges; HOOD, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.