

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT SEAN RODRIGUEZ)
)
 Plaintiff)
)
 v.) Civil No. 00-253-B-S
)
 PENOBSCOT COUNTY JAIL, et al.,)
)
 Defendants)

***RECOMMENDED DECISION ON MOTION TO DISMISS
42 U.S.C. § 1983 COMPLAINT***

Robert Sean Rodriguez has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (Docket No. 1.) He challenges the partiality of disciplinary hearings he underwent for alleged infractions of jail regulations, seeking to have the disciplinary records expunged and an award of monetary damages for the resulting “cruel and unusual punishment.” I granted Rodriguez leave to proceed *in forma pauperis*. (Docket No. 3.) The defendants have filed a motion to dismiss the action. (Docket No. 5.) Rodriguez has not responded. I recommend that Rodriguez’s complaint be **DISMISSED**.

Allegations

Rodriguez’s allegations focus on irregularities in procedure and the truncated timing of his disciplinary hearing and rehearings. On September 26, 2000, while incarcerated¹ at the Penobscot County Jail, Defendant Donald Day accused Rodriguez of violating six of the institution’s rules and regulations. The appropriate jail employee did

¹ It is not clear from Rodriguez’s pleadings if he is a pre-trial detainee or has been convicted and is serving a sentence at the jail. In their motion to dismiss the defendants state that Rodriguez was a pre-trial detainee at the time of the relevant events. I address his complaint as if he were a pretrial detainee, a characterization that cannot but favor Rodriguez.

not receive Day's incident report until the morning of September 28, 2000. Just over ten hours later, and only three and a half hours after Day turned in the incident report, Rodriguez was taken to the shift commander's office and formally charged with the violations.

Defendant James Kennedy directly commenced an investigation and on October 2, 2000, Kennedy and Defendant William Gardner conducted a disciplinary proceeding. They found Rodriguez guilty of five violations and dismissed an escape-based charge. Rodriguez received forty-five days of lock-up and all his (unspecified) privileges were revoked.

The Disciplinary Board told Rodriguez that he had only twelve hours to appeal this decision, when in fact he had ten days. Rodriguez appealed within twelve hours. Defendant Richard Clukey, who had reviewed the incident report and ordered the disciplinary reports, conducted the hearing and denied his appeals. Rodriguez's punishment commenced on October 3, 2000.

On November 20, 2000, Rodriguez received a letter from Clukey notifying him that all the hearings in which Kennedy participated were to be reheard by a board composed of previously uninvolved individuals. A rehearing on one of Rodriguez's alleged violations was held on November 20, 2000, at the shift commander's office with two individuals, who are not named as defendants, presiding. During the hearing the hearing officers reviewed notes from the first hearing. Rodriguez received no prior notification of the rehearing and, consequently, did nothing to prepare. Rodriguez was found guilty and Clukey denied Rodriguez's appeal of this decision on November 22, 2000.

A rehearing on the remaining four counts was conducted on November 24, 2000. At 9:45 p.m., Rodriguez was called to the shift commander's office and told for the first time that the rehearing was to take place, there and then. Again, two individuals not named in this action conducted the proceeding, once again reviewing the notes from the original disciplinary hearing. Rodriguez was found guilty of three counts and the fourth was dismissed. Again Rodriguez appealed and Clukey denied the appeal on December 1, 2000.

With respect to the relief requested, Rodriguez wants the court to order the jail to "dismiss" and expunge from his record all the disciplinary reports bearing the date of September 28, 2000. He also seeks damages of \$300 per day, premised on a theory that because he was not provided with an impartial and procedurally sound disciplinary hearing he was unjustly punished and that this amounts to cruel and unusual punishment.

Discussion

The court "shall" dismiss Rodriguez's *in forma pauperis* action at any time it determines that the action "fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). I take Rodriguez's allegations as true, viewing them in a light that is most favorable to him. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993).

Rodriguez's complaint is susceptible to dismissal by virtue of two distinct limitations on § 1983 causes of actions articulated by the Supreme Court. The cases, Sandin v. Conner, 515 U.S. 472 (1995) and Edwards v. Balisok, 520 U.S. 641 (1997), are factually distinguishable from Rodriguez's but the principles in each can be applied to this complaint. The defendants have also asserted that they are protected from this suit

by the doctrine of qualified immunity and, for reasons connected to the analysis under Sandin, the complaint is most susceptible to dismissal on this ground.

A. Rodriguez's Characterization of the Constitutional Basis for his Complaint

First, the characterization of the complaint that Rodriguez proffers must be dispensed with. Though “cruel and unusual punishment” is the dressing Rodriguez gives his factual assertions, the allegations that Rodriguez sets forth cannot be construed as a challenge under this constitutional provision. A pre-trial detainee cannot state a claim under the Eighth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (Eighth Amendment concerns vis-à-vis a state’s power to punish arise only after an adjudication of guilt). However, the fact that Rodriguez has mischaracterized his claim as one seeking redress for cruel and unusual punishment is not what necessitates dismissal of this action.

B. Rodriguez's Due Process Claim Fails Because of Qualified Immunity

Rodriguez is at core complaining that he was denied the process he was entitled to in disciplinary proceedings and that these irregularities resulted in an unjust determination of guilt and an unfair punishment. Whether the plaintiff is a pretrial detainee or a convicted prisoner, a complaint of this ilk is a procedural due process claim. See Sandin, 515 U.S. 472 (discussing convicted prisoner’s due process rights); see also Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980) (addressing allegations of bias in an administrative law proceeding under procedural due process doctrine, stating that “[t]he neutrality requirement helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law”); Wolff v. McDonnell, 418 U.S. 539, 558 (1974)(reviewing a case challenging a prison’s

disciplinary proceeding, stating: “The touchstone of due process is protection of the individual against arbitrary action of the government”).²

To succeed on a procedural due-process theory, Rodriguez must demonstrate that, even assuming there was some failure in process, he had a protected liberty interest in not being subjected to forty-five days of cell lock-up and the revocation of privileges. The Sandin Court concluded that a proper articulation of the due process interests of convicted prisoners is that they are “generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and

² It is true that a pre-trial detainee has a different cache of constitutional protections than a convicted prisoner. Clearly it is impermissible to punish a detainee for a crime prior to a determination of guilt. Bell, 441 U.S. at 535 & n.16. An inquiry into whether the pre-trial detainee is being punished for the pre-detention misconduct prior to an adjudication of guilt implicates substantive due process. United States v. Salerno, 481 U.S. 739, 746 (1987); Bell, 441 U.S. at 535 & n.17 (Fifth Amendment Due Process Clause is appropriate basis for challenging punishment as a pre-trial detainee for the offense for which plaintiff is being detained). In order to meet this standard the complained of action must “shock the conscience” or impinge rights that are implied under our concept of ordered liberty. Salerno, 481 U.S. at 746.

Rodriguez’s allegations do not suggest that he was being punished for his pre-detention conduct. He complains that he was not afforded proper process in defending charges of disciplinary infractions that occurred while he was detained at the jail. See Collazo-Leon v. United States Bureau of Prisons, 51 F.3d 315, 317-18 (1st Cir. 1995) (observing that pre-trial detainee’s segregation and loss of privileges arising from the institution’s disciplinary authority in response to detainee’s misconduct while a detainee could be analyzed through the due process concerns of Bell). The First Circuit in Collazo-Leon examined whether or not the disciplinary punishment of a pre-trial detainee was a punishment for the charged, but unproven crime. The court concluded that if the sanction furthered “some legitimate governmental objective such as addressing a specific institutional violation and is not excessive in light of the seriousness of the violation,” it would not construe the punishment, though punitive, as punishment for prior unproven conduct. Id. at 318. See also Salerno, 481 U.S. at 746-47 (federal statute permitting pre-trial detention is legitimate regulation rather than an avenue for constitutionally impermissible pre-conviction punishment). Addressing the disciplinary infractions of Rodriguez as a pretrial detainee is “reasonably related to a legitimate governmental objective,” Bell, 515 U.S. at 538-39; Collazo-Leon, 51 F.3d at 317-18, in that the “effective management of the detention facility” is a “valid objective that may justify imposition of conditions and restrictions.” Bell, 515 U.S. at 540. See also id. at 540 n.23 (observing that a court must defer to the facility’s officials’ expert judgment as to which factors warrant imposition of conditions and restrictions). Thus, Rodriguez’s is a procedural due process challenge. Salerno, 481 U.S. at 746 (distinguishing substantive and procedural due process with respect to pretrial detainees, stating that even if the action “survives substantive due process scrutiny, it must still be implemented in a fair manner,” as required by procedural due process protections).

significant hardship on the inmate in relation to the ordinary incidents of prison life.” Id. at 484.³

Following the Supreme Court’s guideposts there seems to be no footing for concluding that once the accused is legitimately detained awaiting trial⁴ the detainee has a liberty interest that protects the detainee from restraints that do not impose atypical or significant hardship. The Supreme Court made it clear in Bell that “maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.” 441 U.S. at 546 (emphasis added). The Bell Court further noted that “[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates.” Id. at 546 n.28. In this sense, just as “[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law,” Sandin, 515 U.S. at 485, discipline of the pre-trial detainee for misconduct while detained falls within the expected perimeters of the period of pre-trial detention. See cf. Collazo-Leon, 51 F.3d 315 (pre-Sandin case concluding that it was “reasonable” and constitutionally permissible to

³ Rodriguez complains that the defendants neither followed the “Maine Bail Standards” nor internal jail rules and procedures when they insisted that Rodriguez had only twelve hours to appeal the October 2, 2000, disciplinary determination. Without citing to a regulation or statute, he also suggests that the defendants did not give him time to prepare for his rehearings. While the specifics of any applicable State provisions and the jail’s internal disciplinary hearings may be key in resolving this issue under Supreme Court and First Circuit precedent prior to Sandin, see, e.g., Kentucky Dept’ of Corr. v. Thompson, 490 U.S. 454 (1989); Hewitt v. Helms, 459 U.S. 460 (1983); Parenti v. Ponte, 727 F.2d 21 (1st Cir. 1984), Sandin, addressing the due process claim of a convicted prisoner dissatisfied that he was not permitted to present witnesses at a disciplinary hearing that resulted in disciplinary segregation, drew back from the Court’s prior precedent. The Court lamented the manner in which its precedent in this arena “shift[s] the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation.” 515 U.S. at 481.

⁴ Rodriguez does not challenge the fact of his pre-trial detention. See generally Salerno, 481 U.S. at 755 (addressing a facial challenge to the Bail Reform Act concluding that, though detention before trial is a “carefully limited exception” to the societal norm of liberty, it was permissible when the statute applies to arrestee charged with felonies whose release would be a threat to the safety of individuals or the community).

impose sanctions amounting to sixty days of segregation (with another thirty days running concurrently), and a six month revocation of telephone and visiting privileges for escape and bribery disciplinary violations by pre-trial detainee).

The question present by this case is whether the Sandin rule for convicted prisoners should be extended to pre-trial detainees. The First Circuit has yet to address whether the Sandin analysis applies to pre-trial detainees. The Ninth and the Seventh Circuits have concluded that Sandin does not apply to disciplinary procedures of pre-trial detainees when disciplinary segregation is the imposed punishment. In those cases the liberty interest in not being punished without the full procedural protections requires adherence to rigorous procedures. See Rapier v. Harris, 172 F.3d 999 (7th Cir. 1999); Mitchell v. Dupnik, 75 F.3d 517 (9th Cir. 1996).

Other circuits, albeit in unpublished opinions, have determined that the Sandin analysis is appropriate to apply to pretrial detainee complaints concerning disciplinary sanctions. See, e.g., Johnson v. Esry, 210 F.3d 379 (8th Cir. 2000); Polk v. Parnell, 132 F.3d 33(6th Cir. 1997); Rae v. Henderson, 1995 WL 759466 (D.C. Cir. 1995); see also Revello v. Hansen, 99 F.3d 1150 (10th Cir. 1996)(observing that Sandin may apply to pretrial detainee complaints concerning procedural imperfections in disciplinary hearing, but not deciding the point, concluding that the detainee had sufficient procedure because plaintiff was able to call witnesses and present evidence); Cephas v. Truitt, 940 F.Supp 674, 677-81 (D. Del. 1996)(district court analysis of Bell, Sandin, rejecting Mitchell, concluding that Sandin principles apply to disciplinary hearings and sanction of pretrial detainees).

While such cases have questionable value as precedent on the underlying issue of whether or not Sandin should be applied to pretrial detainees, they do form the basis for determining the first element of the defendants' asserted claim of qualified immunity. The law in this regard is not clearly established. See Siegert v. Gilley, 500 U.S. 226, 231-33 (1991)(clarifying analytical structure for analyzing qualified immunity claims, stressing that the first inquiry must be whether the plaintiff has "allege[d] the violation of a clearly established constitutional right"). Sandin's application to the discipline of pre-trial detainees, and thus the determination of whether the pretrial detainee has the entitlement to procedural protections, let alone what that process might look like, remains an open question.

Taking one step back, disciplinary restraint of the pretrial detainee can fall into three categories: It can be an effort to punish the detainee for the alleged criminal conduct for which the detainee has not yet been found guilty; it can be a condition of confinement to which the detainee is subjected, along with the general population, which he would not have to experience if he was at large; or it can be a restraint that is imposed on the pre-trial detainee in response to the detainee's post-detention disciplinary infraction. Though the Bell Court addressed the impermissibility of using pretrial detention to punish the detainee for unproven criminal conduct and examined whether generalized conditions of confinement amounted to punishment of the pre-trial detainee for the unproven conduct for which he was being detained, it did not address procedural due process concerns surrounding discipline of pretrial detainees for disciplinary infractions while detained.

In Collazo-Leon the First Circuit came close to addressing the third category of claim. It examined “the situation where discrete sanctions were imposed on individual pretrial detainees for specific in-house violations,” using Bell as “rational guidance.” 51 F.3d at 317–18. However, it was reviewing a district court decision that had decided the matter solely on substantive due process grounds, the lower court having concluded that the application of the prison regulation authorizing disciplinary segregation “amounted to impermissible punishment and served no legitimate regulatory purpose in the effective management of the correctional institution.” Id. at 316-17. The First Circuit determined that “reasonable punishment may be imposed to enforce reasonable prison disciplinary requirements but may not be imposed to sanction prior unproven criminal conduct.” Id. at 318. In other words, in the abstract, punishing detainees for misconduct in detention did not violate the detainee’s substantive due process rights. Id. at 318-19 (vacating the grant of habeas corpus relief premised on substantive due process). The First Circuit remanded for a determination of whether the habeas movant’s rights to procedural due process were violated. It is the contours of procedural due process, left unaddressed by the First Circuit in Collazo-Leon, that Sandin addressed vis-à-vis convicted prisoners subject to disciplinary hearings.

Given the lack of “clearly established” post-Sandin case-law regarding the procedural due process issues raised by Rodriguez and the clear First Circuit precedent which authorizes reasonable disciplinary sanctions against pre-trial detainees, Defendants in this case are entitled to qualified immunity as to any civil damage claim. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In sum, qualified immunity requires a determination of whether (1) the plaintiff has alleged a violation of clearly established rights, and (2) whether a reasonable, similarly situated defendant would have understood the challenged conduct violated those clearly established rights. Swain v. Spinney, 117 F.3d 1, 9 (1st Cir. 1997). In this case not only is there a question about whether *any* constitutional right was violated, much less a clearly established right, there is also an inescapable question about whether the defendants, as reasonable officials, should have known that the disciplinary process afforded Rodriguez was deficient in satisfying a clearly established right.⁵ Even the

⁵ Though it is doubtful whether he was entitled to any process, it is without doubt that Rodriguez was not entitled to a disciplinary hearing procedure that has all the checks and balances of a criminal trial. See cf. Wolff, 418 U.S. at 556 (“Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.”).

Indeed, Rodriguez was afforded a process that facially aims to assure that the jail’s disciplinary determination was a fair response to documented disciplinary offenses. Though there was not a great deal of time between the alleged September 26, 2000, infractions and the October 2, 2000, initial hearing, it appears from Rodriguez’s own allegations that he was charged promptly and had notice of the charges against him approximately four full days prior to the hearing. See Wolff, 418 U.S. at 563-64 (prison disciplinary ‘defendant’ must have at least twenty-four hours between notice of the alleged violation and the disciplinary hearing). Though Rodriguez seems to suggest that there was insufficient time for internal investigation prior to the first hearing, and that the disciplinary report was not presented to the appropriate official in a timely manner for this hearing, there is no suggestion of how this prejudiced Rodriguez. Indeed, within the context of prison discipline these shortened time frames for preparation seem consistent with the need to promptly address the alleged disciplinary problem and to either acquit the detainee or to implement a regime that addresses the individual’s misconduct and preserve’s institutional safety and order in light of the misconduct.

Rodriguez’s other complaints concern his appeal and the rehearing process. With respect to the appeal of the first rehearing, the procedural protections provided vis-à-vis an appeal of an otherwise unassailable primary process generates less concern for due process rights. The misinformation given Rodriguez concerning the timeframe for him to appeal the initial determination may have put added pressure on him to decide and prepare his appeal. However, there was no tangible prejudice to him as he timely lodged his appeal and the fact that this appeal was denied the next day caused no lasting harm in light of the later rehearings of the charges.

With respect to the rehearings, Rodriguez received a notice on November 3, 2000, that he would have a second review on his charges. Seventeen days later the first of the rehearings took place and twenty-four days later the second rehearing occurred. Though Rodriguez complains that he never received dates for these events and, thus, could not prepare a defense, the time provided seems ample to so prepare, especially since Rodriguez had already been through a hearing and appeal on all the charges. The fact that the jail may have had a “rolling docket” of sorts for these rehearings is not objectively unreasonable, particularly in light of the general notice provided Rodriguez well in advance of the hearing date. (Certainly, with respect to the latter rehearing on four of the five charges, Rodriguez was on notice as a result of the November 20, 2000, hearing that the hearing could occur at any time.) Finally, it is possible to read Rodriguez’s factual allegations as the predicates for a claim that the initial disciplinary hearing and the subsequent rehearings were infused with bias. The fact that the jail instigated

Seventh Circuit, which in Rapier refused to apply the Sandin analysis to a pretrial detainee faced with disciplinary segregation, recognized that the law was not sufficiently clear to deny defendants' claim of qualified immunity. 172 F.3d at 1006 -07. Thus, it is appropriate to conclude, as a matter of law, that the defendants are entitled to qualified immunity. Tatro v. Kervin, 41 F.3d 9, 15 (1st Cir 1994) ("Qualified immunity, which is a question of law, is an issue that is appropriately decided by the court during the early stages of the proceedings and should not be decided by the jury.").

C. Rodriguez's § 1983 Complaint as Non-Cognizable

Alternatively, the defendants argue that dismissal of Rodriguez's complaint could be grounded on the holding of Edwards v. Balisok, 520 U.S. 641. In Edwards, the Supreme Court addressed a § 1983 complaint filed by a state prisoner and premised on allegations that the procedures used in a disciplinary hearing on infractions of prison regulations violated the plaintiff's Fourteenth Amendment right to due process. The Edwards plaintiff alleged that he was denied the opportunity to put on witnesses and that the deceit and bias of the hearing officer resulted in the exclusion of exculpatory evidence. Id. at 646-47.

In affirming the dismissal of the § 1983 complaint for failure to state a cognizable claim, the Edwards Court drew on its holding in Heck v. Humphrey, 512 U.S. 477

rehearings on several matters heard by Kennedy gives credence to a concern about impropriety in the first hearing. However, there is nothing in Rodriguez's allegations to suggest that the rehearings were anything but an effort to assure that the initial disciplinary determination was proper. And though Rodriguez earnestly protests the impropriety of the review of the first hearing notes Kennedy prepared by the officers conducting the later hearings, this practice is not inherently prejudicial to a fair rehearing. Indeed, such a review might be a necessary mechanism to assure that the hearing officers are fully reviewing any perceived inadequacies in the initial determination. This check-and-balance advantaged Rodriguez, as one of the five charges was dismissed in the second rehearing. Further, Rodriguez seems to assert that there was an impropriety, amounting to bias, in allowing Clukey to review the incident report, order disciplinary reports, and to then conduct the appeal. It is hard to make out how this prior contact with the incident would per se prejudice the appeals officer, given that the incident report is part of the record below to be reviewed on appeal and that the ordering of the disciplinary report is a necessary procedural predicate to affording Rodriguez a hearing on his alleged infractions.

(1994): a prisoner can only challenge a conviction or sentence in a § 1983 action when the conviction or sentence has been previously invalidated if resolution of the § 1983 claim in favor of the plaintiff would imply the invalidity of the conviction or sentence. Edwards, 520 U.S. at 643. The Court, reviewing a disciplinary decision that resulted in the reduction of good-time credits, concluded that the same principle applied to challenges to prison disciplinary decisions. Id. at 648.

Rodriguez expressly seeks to have the determination of the disciplinary hearing overturned. And, like the § 1983 plaintiff in Edwards, Rodriguez seeks damages for the imposition of punishment exacted without due process. That is, his challenge to the procedures is also a challenge to the result. See Edwards, 520 U.S. at 645 (describing as “incorrect” the court of appeals’ conclusion that a challenge that focuses only on the process used, and which does not directly challenge the result, is always cognizable under § 1983). Because a determination in Rodriguez’s favor would imply the invalidity of the challenged finding of guilt and the punishment imposed, § 1983 is an impermissible vehicle for mounting the challenge. Id. at 645-46.⁶

⁶ The § 1983 plaintiff might do a double take: the more substantial the plaintiff’s allegation of improper process in arriving at the determination and sentence the less likely the plaintiff can proceed with a § 1983 complaint on grounds that his or her right to due process has been infringed. See id. at 647.

The bottom line is that § 1983 is an improper vehicle for challenging a disciplinary infraction determination or the punishment, unless the determination and/or sentence is invalidated first. As Justice Ginsburg suggested, it may be possible to lodge a § 1983 challenge to the proceeding by dint of a due process theory on grounds that the relief requested does not implicate the validity of the determination or sentence. See id. at 649-50 (Justice Ginsburg, joined by Justice Souter and Justice Breyer, concurring). However, Rodriguez, though he suggests that the defendants strayed from proper procedure -- by allowing Kennedy to participate as a hearing officer in the initial disciplinary determination, by Clukey assuming a role in the early investigation and conducting the review, in truncating his appeal period and by not giving him sufficient time to prepare -- seeks an invalidation or “dismissal” of the disciplinary reports and damages for the attendant punishment. Preventing a back-door federal challenge to the validity of a state agency determination is the core concern underlying Edwards. Huey v. Stine, 230 F.3d 226, 230 (6th Cir. 2000). Barring the back door harmonizes with the Court’s concern that the federal courts do not become involved in day-to-day prisons management, “squandering judicial resources with little offsetting benefit to anyone,” and not affording flexibility to the state officials who must manage these volatile prison environments. Sandin, 515 U.S. at 482.

However, there are two provisos that qualify a recommendation that the Court apply Edwards to dismiss Rodriguez’s complaint. First, this case is unlike Edwards in that there are no good-time credits at stake. The Edwards Court did preface its discussion with the statement: “This case presents the question whether a claim for damages and declaratory relief brought by a state prisoner challenging the validity of the procedures used to deprive him of good-time credits is cognizable under § 1983.” Id. at 643 (emphasis added). However, the Court articulated its holding more broadly: “We conclude, therefore, that respondent’s claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983.” Id. at 648 (emphasis added). For this reason, it is not clear whether Edwards is limited to disciplinary determinations implicating good-time credits.⁷

⁷ Analyzing this question implicates a line of Supreme Court precedent that preceded and followed Edwards, see Preiser v. Rodriguez, 411 U.S. 475(1973); Wolff v. McDonnell, 418 U.S. 539; Heck, 512 U.S. 477; Spencer v. Kemna, 523 U.S. 1 (1998), and cases from other circuits interpreting Edwards, see, e.g., DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000); Riley v. Kurtz, 194 F.3d 1313 (6th Cir. 1999)(unpublished disposition); Cooper v. Schriro, 189 F.3d 781 (8th Cir. 1999); Jenkins v. Haubert, 179 F.3d 19 (2nd Cir. 1999).

The First Circuit has yet to grapple with Edwards in the context of a prison disciplinary proceeding. It has applied its rule to a parole revocation, concluding that the due process challenge to the revocation, premised on the plaintiff not being furnished with an attorney at the revocation hearing, was not cognizable under § 1983 because a decision in the plaintiff’s favor in the § 1983 action would “call into question the validity of the state’s decree revoking his parole and ordering him back to prison.” White v. Gittens, 121 F.3d 803, 806- 07(1st Cir. 1997).

The Second and Seventh Circuits read Edwards to permit a § 1983 challenge to a prisoner’s disciplinary determination if the determination does not effect the term of imprisonment (e.g., good time credits) and/or when the plaintiff has no recourse in a state forum or the ability to challenge the judgment through a writ of habeas corpus. In these cases, recognizing that Edwards did not decide the precise point, the panels attempted to read the direction of the wind from the Supreme Court by overlaying the Edwards holding with indications from concurrences, dissents, and dicta in post-Edwards Supreme Court cases. See DeWalt, 224 F.3d at 614-18 (Seventh Circuit overturning its earlier contrary interpretation of Edwards in Stone-Bey v. Barnes, 120 F.3d 718 (7th Cir. 1997)); Jenkins, 179 F.3d at 423-27(concluding that a § 1983 challenge can be lodged vis -à-vis a prison administrative or disciplinary determination if punishment did not impact the length of the prisoner’s confinement).

The First Circuit has made it clear when it comes to this line of cases, that it will not pursue a wet-finger-in-the-air jurisprudence that relies on indications from dicta not embraced by the majority opinion to smudge the apparent bright line rule of Heck. Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (observing that the dicta from concurrences and dissents in Spencer “may cast doubt upon the universality

My second proviso regarding applying Edwards (in lieu of qualified immunity) concerns a bubble in the as yet untested allegations of Rodriguez's complaint. He alleges that he was charged with six major disciplinary violations and that as a result of the grievance procedure one of those violations was ultimately dismissed on November 27, 2000. Rodriguez's punishment, which consisted of forty-five days of cell lock-up, was allegedly imposed commencing October 3, 2000 and would have been completed by November 27, 2000. As to what role, if any, the dismissed violation might have played in the severity of the disciplinary decision the record does not reveal. Since it is arguable that Rodriguez could meet the Edwards prerequisite for § 1983 cognizance, *i.e.*, the invalidity of at least a portion of the original disciplinary decision, I hesitate to embrace the defendants' suggestion by recommending dismissal in reliance upon the Edwards rationale.

D. Dismissal as to Defendant Cheryl Gallant

In the event that the Court does not adopt my recommendation of dismissal of the complaint in its entirety on either of the above two grounds, I recommend that the Court

of Heck's 'favorable termination' requirement" but obeying the admonishment to the lower federal courts "to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court 'the prerogative of overruling its own decisions'"(quoting Agostini v. Felton, 521 U.S. 203 (1997); accord Randell v. Johnson, 227 F.3d 300, 301-02 (5th Cir. 2000)(same admonition when applying Heck); Huey, 230 F.3d at 229-30(same, Sixth Circuit).

And the Fifth and Sixth Circuits read Heck and Edwards as not turning on the challenged determination's impact on the term of imprisonment or the availability of an alternative forum in which to lodge the challenge. See Huey, 230 F.3d 226 (Sixth Circuit concluding that the unavailability of *habeas corpus* relief did not lift the Heck bar on plaintiff's § 1983 challenge based on cruel and unusual punishment by inmate convicted of misconduct and sentenced to detention with a loss of privileges); Randell, 227 F.3d at 301-02 (Fifth Circuit refusing to relax Heck's "universal favorable termination requirement" for plaintiff claiming an unavailability of *habeas corpus* relief); see also Cooper, 189 F.3d at 784-85 (Eighth Circuit applying Edwards and Heck as a bar, in the absence of a prior invalidation of the disciplinary decision, to allegations in a § 1983 complaint that challenged denial of due process in disciplinary hearing that resulted in punishment, yet allowing a request to enjoin future due process violation to go forward because this request did not attack the plaintiff's disciplinary determination).

dismiss the complaint as to Defendant Cheryl Gallant. Gallant appears nowhere in Rodriguez's complaint, save the caption and the listing of additional defendants.

Conclusion

For the forgoing reasons, I recommend **DISMISSAL** of Rodriguez's complaint as to Defendant Cheryl Gallant because it fails to state a claim and as to all the other defendants on the grounds of qualified immunity.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

Dated April 11, 2001.

PR1983

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-253

RODRIGUEZ v. PENOBSCOT COUNTY JAI, et al

Filed: 12/08/00

Assigned to: Judge GEORGE Z. SINGAL

Demand: \$0,000

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Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Prisoner Civil Rights

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 defendant (See above)
 [COR LD NTC]

JAMES KENNEDY MICHAEL J. SCHMIDT, ESQ.
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 [COR LD NTC]

WILLIAM GARDNER MICHAEL J. SCHMIDT, ESQ.
 defendant (See above)
 [COR LD NTC]

DONALD DAY MICHAEL J. SCHMIDT, ESQ.
 defendant (See above)
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