



## Kennard v. MarQueez et al

2023 | Cited 0 times | S.D. Texas | March 30, 2023

### UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION JASON J. KENNARD, § § Plaintiff, § § v. § Civil Action No. 4:21-CV-04191 § MARLEN MARQUEZ, KAYLA TIMKO, § BRANDON P. TREVENO, and § GARRETT SIMMONS, § § Defendants. §

MEMORANDUM OPINION AND ORDER Plaintiff Jason J. Kennard is an inmate in the Texas Department of Criminal Justice 1983 alleging that Defendants Marlen Marquez, Kayla Timko, Brandon P. Treveno, and Garrett Simmons denied him due process in a disciplinary proceeding. He seeks monetary, declaratory, and injunctive relief. Pending before the Court is No. 42). For the following reasons, the Court GRANTS the Motion.

#### I. BACKGROUND 1

Kennard alleges that he was attacked from behind by another inmate, resulting in hospitalization for an eye injury. (Dkt. No. 1 at 2). After returning to his unit, a disciplinary hearing occurred where Kennard was questioned by Defendants specifically by Simmons, Marquez, and Timko. (Id. at 3). A statement by Defendant

1 For purposes of addressing this Motion, the Court accepts all factual allegations in the Complaint as true and views them in the light most favorable to Kennard. See *White v. U.S. Corrections, L.L.C.*, 996 F.3d 302, 306 07 (5th Cir. 2021).

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ENTERED March 31, 2023 Nathan Ochsner, Clerk Treveno was presented at the hearing stating that other inmate during the fight. (Id.). At the conclusion of the hearing, Kennard was written up for fighting. (Id.). Kennard alleges that his injuries prove that he was attacked from behind and was not the aggressor in the fight, and that Defendants knowingly filed false charges against him. (Id.). Kennard used the TDCJ grievance procedure available to inmates to dispute his disciplinary case; however, his grievance was denied. (Id. at 4). II. LEGAL STANDARD

A. RULE 12(B)(1) Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a defendant to move subject-matter -pleaded factual allegations



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Carver v. Atwood, 18 F.4th 494, 496 (5th Cir. 2021). Dismissal for lack of subject- Ghedi v. Mayorkas, 16 F.4th 456, 463 (5th Cir. 2021) (citations

and Dickson v. United States, 11 F.4th 308, 312 (5th Cir. 2021).

other Rule 12 motions, the court should D&G Holdings, L.L.C. v. Becerra, 22 F.4th 470, 474 (5th Cir. 2022) (quoting Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001)).

B. RULE 12(B)(6) Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move the Federal Rules of Civil Procedure requires

demands more than . . . labels and conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129

S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)). a cause of action, supported by mere conclusory statements Id. The

defendant, as the moving party, bears the burden of proving that no legally cognizable claim for relief exists. Flores v. Morehead Dotts Rybak, Inc., No. 2:21-CV-00265, 2022 WL 4740076, at \*2 (S.D. Tex. Sept. 29, 2022) (citing 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed.)).

factual allegations as true and view those allegations in the light most favorable to the

plaintiff. White, 996 F.3d at 306 07 Iqbal A claim has facial plausibility when

the plaintiff pleads factual content that allows the court to draw the reasonable inference Id. Id Montoya v. FedEx Ground Package Sys., Inc., 614 F.3d 145, 148 (5th Cir. 2010) (quoting Twombly, 550 U.S. at 555, 127 S.Ct. at 1965). III. DISCUSSION Defendants move for dismissal under both Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. No. 42 at 1). Defendants argue they are immune due process. (Id. at 2 7). The Court agrees.

A. ELEVENTH AMENDMENT IMMUNITY In their Motion, Defendants argue that the Eleventh Amendment bars Kennard from filing suit against Defendants in their official capacity for monetary damages, and, as such, the Court does not have subject matter jurisdiction over these claims. (Id. at 2 3). The Eleventh Amendment provides in full:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. nor agencies acting under its control may be sub Cox v. Texas,



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see also *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 687 88, 121 L.Ed.2d 605 (1993) (citations omitted). The Fifth Circuit has held that the TDCJ is a state agency that enjoys immunity from suit in federal court. *Harris v. Angelina Cnty., Tex.*, 31 F.3d 331, 338 n.7 instrumentality of the state operating as its alter ego in carrying out a public function of The Fifth Circuit has further an official capacity. See *Aguilar v. TDCJ*, 160 F.3d 1052, 1054 (5th Cir. 1998); accord *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (noting that the Fifth Circuit has twice [] held that the Eleventh Amendment bars recovering § 1983 money damages from TDCJ officers in their official capacity ). Therefore, the for monetary damages against Defendants in their official capacity.

**B. FOURTEENTH AMENDMENT DUE PROCESS** Kennard contends that his due process rights were violated when Defendants wrote him up for fighting despite knowing that the charges were false. (Dkt. No. 1 at 3). Defendants move for dismissal of this claim arguing that Kennard has not stated a violation of his due process rights because he was provided an adequate hearing and was not deprived of good-time credit. (Dkt. No. 42 at 5 6). The Court agrees with Defendants.

Process Clause of the Fourteenth Amendment to the U Dillon v. Little, No. 4:17-CV-00577, 2018 WL 2209211, at \*5 (S.D. Tex. May 14, 2018) (citing *Wolff v. McDonnell*, 418 U.S. 539, 554 55, 94 S.Ct. 2963, 2974 75, 41 L.Ed.2d 935 (1974)). violations are entitled to rights under the Due Process Clause only when the disciplinary action may result in a sanction that will Id. (citing *Sandin v. Conner*, 515 U.S. 472, 478, 115 S. Ct. 2293, 2302, 132 L. Ed. 2d 418 (1995)). Generally speaking, [t]here is no due process violation if a prisoner, who is falsely accused of charges, is given an adequate state procedural remedy to challenge the accusations. *Jackson v. McKinney*, 24 F.3d 238, 238 (5th Cir. 1994). A the findings made in the disciplinary hearing, a prisoner cannot show that he was

punished without due process. Dillon, 2018 WL 2209211, at \*6 (citing *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 457, 105 S. Ct. 2768, 2775, 86 L. Ed. 2d 356 (1985)). Here, Kennard does not claim that he was denied a hearing on the disciplinary charges, (see generally Dkt. No. 1), and, therefore, cannot state a claim for denial of due process. The Court, therefore, based on violations of the Due Process Clause. IV. CONCLUSION Considering the foregoing analysis, the Court GRANTS Dismiss, (Dkt. No. 42). The Court DISMISSES , (Dkt. No. 1),

WITHOUT PREJUDICE. The Clerk is DIRECTED to CLOSE the case. It is SO ORDERED. Signed on March 30, 2023.

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DREW B. TIPTON UNITED STATES DISTRICT JUDGE

