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Clerk, U.S. District Court
District Of Montana
Helena

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

DISABILITY RIGHTS MONTANA, INC., Plaintiff, vs. RICHARD OPPER, in his official capacity as Director of the Montana Department of Public Health and Human Services, et al., Defendants.	CV 14-25-BU-SEH **MEMORANDUM AND ORDER**

INTRODUCTION

This case arises from what are claimed to be deficiencies in the State of Montana's implementation of certain statutes related to the sentencing and commitment of persons convicted of a crime who are determined under Montana

law to be "suffering from a mental disease or defect or developmental disability that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law."[1] Such persons are characterized in the Complaint as Guilty But Mentally Ill (GBMI).

Defendants, Richard Opper (Opper), current Director of Montana Public Health and Human Services (DPPHS), and John Glueckert (Glueckert), the present Administrator of the Montana State Hospital (State Hospital), are named in a single count of the Complaint, Count I. That Count relates to events described in Paragraphs 77-101 involving three unnamed persons identified only as Prisoner No. 1, Prisoner No. 2 and Prisoner No. 3. Prisoner No. 1 was sentenced GBMI in 2006 and transferred to the Montana State Prison in 2008. Prisoner No. 2 was sentenced in 2002 and transferred to the Montana State Prison in 2007. Prisoner No. 3 was sentenced in 2006 and transferred that same year. Events related to the transfer of each are found in Paragraph 79 (Prisoner No. 1), Paragraph 86 (Prisoner No. 2), and in Paragraphs 94 and 95 (Prisoner No. 3).

[1] Mont. Code Ann. § 46-14-311(1) (2013).

Opper and Glueckert have moved under Fed. R. Civ. P. 12(b)(6) and 8(a) to dismiss.[2] The motion is opposed.[3]

CLAIM

The claim against Opper and Glueckert asserted to rise to the level of a liberty interest with federal due process protection under the Fourteenth Amendment is that "[i]ndividuals who have been found by a [Montana] court to be Guilty But Mentally llI and committed to the custody of DPHHS possess a liberty interest to be free from arbitrary transfers out of the State Hospital and into other facilities, [namely, the Montana State Prison] when the result of such transfers will be detrimental to the GBMI individual's custody, care, and treatment needs."[4]

PRAYER FOR RELIEF

The relief sought is direct and specific. No personal liability relief against Opper or Glueckert is claimed. Nor does Plaintiff seek damages for alleged past wrongs. It, likewise, does not challenge the validity of the state statutory program governing sentence of Prisoners No. 1, No. 2, and No. 3 on constitutional grounds. Only what are claimed to be ongoing practices in implementing the statutory

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[2] (Doc. 17.) The remaining counts in the Complaint, II, III, and IV, are directed at other persons charged as "Prison Defendants" and are not placed in issue by the present motion.

[3] (*See* Doc. 17 at 1.)

[4] (Doc. 1 at 47.)

program, specifically Mont. Code. Ann. § 46-14-312 (2013),[5] are the target of requested declaratory and injunctive relief.

ISSUE

The issue before the Court, as framed by the pleadings and the prayer for relief, is itself narrow. Does the Complaint adequately plead: (1) the existence of a constitutionally-protected liberty interest; and (2) a violation of that protected interest that survives Defendants Opper and Glueckert's Rule 12(b)(6) motion?

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[5] The statute provides, in pertinent part,

> (2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect or developmental disability as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply. The court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, in an appropriate correctional facility, mental health facility, as defined in 53-21-102, residential facility, as defined in 53-20-102, or developmental disabilities facility, as defined in 53-20-202, for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The director may, after considering the recommendations of the professionals providing treatment to the defendant and recommendations of the professionals who have evaluated the defendant, subsequently transfer the defendant to another correctional, mental health, residential, or developmental disabilities facility that will better serve the defendant's custody, care, and treatment needs. The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

DISCUSSION

Sufficiency of Pleadings

Bell Atl. Corp. v. Twombly[6] and *Ashcroft v. Iqbal*[7] furnish the backdrop for analysis of the sufficiency of the Complaint.[8] The Ninth Circuit has noted that "[p]rior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief."[9] However, post-

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[6] 550 U.S. 544 (2007).

[7] 556 U.S. 662 (2009).

[8] Plaintiff relies on *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011) to support a premise that notice pleading alone is still the proper standard. However, this is misplaced. Although the allegations in the claims section of the *Starr* complaint stated only mere conclusory allegations, there were a multitude of factual allegations contained in over twenty paragraphs in the complaint stating *specific* factual components relating *directly* to the defendant and his alleged misconduct as a prison official. *See Starr*, 652 F.3d at 1209-12. In fact, *Starr* recognizes a possible controversy between cases in other circuits post-*Iqbal*. The opinion addresses the pleading requirement discrepancy as follows:

> But whatever the difference between these [post-*Iqbal]* cases, we can at least state the following two principles common to all of them. First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, *but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief*, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Starr, 652 F.3d 1202, 1216 (emphasis added).

[9] *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009)(citation omitted).

Twombly, complaints only alleging "labels and conclusions," "formulaic recitation[s]" or "naked assertion[s]" are inadequate pleadings and will not survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.[10] Instead, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[11] "Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory."[12]

Liberty Interest Claimed

The Court's opinion in *Chappell v. Mandeville*[13] contains an excellent summary of current Ninth Circuit law on a liberty interest claim of the sort advanced here.

> A liberty interest can arise from one of two sources—either the Due Process Clause of the Fourteenth Amendment or state law.[14]
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> . . . .

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[10] *Twombly*, 550 U.S. at 555, 557.

[11] *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570); *see Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009)(finding the same).

[12] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011)(citation omitted).

[13] 706 F.3d 1052, 1054 (9th Cir. 2013).

[14] *Chappell,* 706 F.3d at 1062 (citation omitted).

> "[L]awfully incarcerated persons retain only a narrow range of protected liberty interests." . . . Thus, "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."[15]
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> . . . .
>
> Only the most extreme changes in the conditions of confinement have been found to directly invoke the protections of the Due Process Clause, such as involuntary commitment to a mental institution . . .[16]
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> . . . .
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> A state may create a liberty interest through statutes, prison regulations, and policies.[17]
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> . . . .
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> *Sandin* and its progeny made this much clear: to find a violation of a state-created liberty interest the hardship imposed on the prisoner must be "atypical and significant . . . in relation to the ordinary incidents of prison life."[18]
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> . . . .
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> "[A]typical and significant hardship" is context-dependent and requires "fact by fact

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[15] *Id.* at 1062-1063 (alteration in original)(citations omitted).

[16] *Id.* at 1063 (citation omitted).

[17] *Id.* (citing *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005); *Neal v. Shimoda*, 131 F.3d 818, 827 (9th Cir.1997)).

[18] *Id.* at 1064 (quoting *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995)).

> consideration,"[19] . . . "[t]here is no single standard for determining whether a prison hardship is atypical and significant" and that analysis under this standard requires "case by case, fact by fact consideration."[20]

Notwithstanding the length and detail of the highly editorialized allegations in the fifty-four page Complaint, much of what is asserted is unrelated to the single claim against Opper and Glueckert who assumed their respective positions in December 2012[21] and February 2010.[22] Neither can be said to have had any personal involvement with or responsibility for DPPHS or the State Hospital in 2006, 2007, or 2008 when Prisoners No. 1, No. 2, and No. 3 are asserted to have been transferred.

Moreover, the allegations related to the transfers fail to provide the necessary claim related and fact specificity mandated by the principles in *Chappell* and in keeping with *Iqbal* and *Twombly*. Formulaic recitations and conclusionary or naked assertions of arbitrary transfer, violation of law, absence of proper notice and fair opportunity to be heard are inadequate.

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[19] *Id.* (quoting *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998)).

[20] *Id.* (quoting *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003)).

[21] (*See* Doc. 18-2 at 1.)

[22] (*See* Doc. 18-3 at 1.)

The Complaint purports to seek relief on behalf of all GBMI prisoners committed to the custody of the DPHHS, who, by ongoing practice "are arbitrarily transferred out of the State Hospital, in violation of law, and without proper notice and a fair opportunity to challenge the transfer decision."[23] This blanket "one size fits all" approach is flawed on many levels.

The case as pleaded and for which relief is sought patently conflicts with the clear directive of *Sandin* and Ninth Circuit precedent that a "case by case" and "fact by fact" analysis must be undertaken to determine that a particular transfer, if it be a protected liberty interest, is shown to be violative of the "atypical and significant hardship" test.

The implicated Montana statute (Mont. Code Ann. § 46-14-312), which is not itself challenged, spells out a procedural format for addressing and acting on transfer questions which is to be followed on an individual, prisoner by prisoner basis. It defies logic and reason to assume or hypothesize that absent adequate allegations grounded in fact, applicable to a particular prisoner, that any constitutionally-protected liberty interest violation has taken place.

The pleading fails to appropriately allege that Prisoners No. 1, No. 2 or No. 3, or any of them, were in fact transferred to the Montana State Prison from the

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[23] (Doc. 1 at 48.)

State Hospital by process inconsistent with the requirements of law, or, that either Opper or Glueckert was personally involved with whatever process was followed. The allegations in the Complaint, as to Count I directed against Opper and Glueckert, do not meet the pleading standards required of *Iqbal* and *Twombly.*

No advisory opinion can be rendered or comment made as to practices or procedures that may or may not have been undertaken or carried out. Moreover, the Court has made no ruling on a question which is not decided, namely, whether a particular prisoner determined GBMI, and committed to the custody of the Director of DPPHS may, in an appropriate case, claim a Fourteenth Amendment due process protected liberty interest in procedures carried out in effecting transfer from the State Hospital to the Montana State Prison. Unless and until an appropriate pleading is made on behalf of a person who claims that his or her constitutionally-protected rights were infringed, no justiciable issue is presented.

CONCLUSION

Count I of the Complaint against Defendants Opper and Glueckert is dismissed.

DATED this 24th day of July, 2014.

Sam E. Haddon

SAM E. HADDON
United States District Judge