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NOT RECOMMENDED FOR PUBLICATION

No. 23-1775

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 24, 2024
KELLY L. STEPHENS, Clerk

JIMMIE LEON GORDON,	)
	)
Plaintiff-Appellant,	)
	) ON APPEAL
v.	) FROM THE
	) UNITED STATES
SHERRY L. BURT, sued in her individual capacity as an employee of the State of Michigan, et al.,	) DISTRICT COURT
	) FOR THE
	) WESTERN
	) DISTRICT OF
Defendants-Appellees.	) MICHIGAN

O R D E R

Before: SILER, MOORE, and WHITE, Circuit Judges.

Jimmie Leon Gordon, a pro se Michigan prisoner, appeals the district court's judgment dismissing his 42 U.S.C. § 1983 civil rights complaint. Gordon moves the court to appoint counsel to represent him on appeal. 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). For the following reasons, we vacate the district court's judgment and remand this case for further proceedings. We deny Gordon's motion for appointment of counsel as moot.

Gordon filed a § 1983 complaint against Warden Sherry L. Burt and Deputy Warden Darrell M. Steward, claiming that they violated the Eighth Amendment by being deliberately indifferent to the risk that the COVID-19 pandemic presented to him. He also alleged that the prison librarian, defendant Elisha Hardiman, violated (1) the First Amendment by denying him access to the courts and (2) the Americans With Disabilities Act by keeping him from participating in the legal writer program. Finally, Gordon brought state law claims for gross negligence against Warden Burt and Deputy Warden Steward. The district court dismissed Gordon's complaint for failure to state a claim upon initial screening under 28 U.S.C. § 1915(e)(2).

On appeal from that judgment, we concluded that Gordon had abandoned his First Amendment, disability-discrimination, and gross-negligence claims. *See Gordon v. Burt*, No. 21- 1832, slip op. at 4-5 (6th Cir. Aug. 17, 2022). But we concluded that the district court erred in dismissing Gordon's deliberate-indifference claim because it failed to accept as true Gordon's allegations that Warden Burt and Deputy Warden Steward disregarded published COVID-19 social-distancing guidelines by purposefully housing inmates in dormitory-style quarters and failing to isolate infected prisoners. *See id.* at 6-7. Accordingly, we vacated the district court's judgment as to Gordon's deliberate-

indifference claim and remanded that claim to the district court for further proceedings.

On remand, Warden Burt and Deputy Warden Steward asserted that they were entitled to qualified immunity and moved to dismiss Gordon's deliberate-indifference claim under Federal Rule of Civil Procedure 12(b)(6). The district court adopted a magistrate judge's report and recommendation that concluded that, under the unprecedented circumstances of the COVID-19 pandemic and accepting Gordon's allegations as true, no clearly established federal law would have alerted the defendants that their actions were unconstitutional. Accordingly, the court concluded that the defendants were entitled to qualified immunity and dismissed Gordon's deliberate-indifference claim.

On appeal, Gordon argues that the district court erred by ruling that the defendants were entitled to qualified immunity at the pleading stage because additional factual development of his deliberate-indifference claim is required. He also seeks to revive his abandoned First Amendment, disability-discrimination, and gross-negligence claims.

We review de novo both a district court's dismissal of a complaint under Rule 12(b)(6), *Bickerstaff v. Lucarelli*, 830 F.3d 388, 395-96 (6th Cir. 2016), and its determination that a public official is entitled to qualified immunity, *Ashford v. Univ. of Mich.*, 89 F.4th 960, 969 (6th Cir. 2024).

A complaint will be dismissed under Rule 12(b)(6) if it does not plead facts, accepted as true and viewed in the light most favorable to the plaintiff, that state a plausible claim to relief. *Bickerstaff*, 830 F.3d at 396.

Determining whether a prison official is entitled to qualified immunity is a two-step process. First, the reviewing court must decide whether the facts of the case show the violation of a constitutional right. *See Sumpter v. Wayne County*, 868 F.3d 473, 480 (6th Cir. 2017). Second, the court must determine whether the right was clearly established at the time of the incident. *See id.* To be clearly established, "existing law must have placed the constitutionality of the [official's] conduct 'beyond debate.'" *Dist. of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). In other words, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.*

The plaintiff bears the burden of proving that the defendant is not entitled to qualified immunity. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009). To meet this burden, the plaintiff must "produce an on-point, binding case" that shows that the right at issue was clearly established. *Brown v. Giles*, 95 F.4th 436, 439 (6th Cir. 2024). But "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citations omitted).

We previously concluded that Gordon stated an Eighth Amendment violation. *See Gordon*, No. 21-1832, slip op. at 6-7. And notwithstanding the novelty of the coronavirus, it was clearly established before the onset of the COVID-19 pandemic that prison officials cannot exhibit deliberate indifference to an inmate's exposure to dangerous communicable diseases. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms."); *cf. Hampton v. California*, 83 F.4th 754, 770 (9th Cir. 2023) ("*Helling* sent a clear message to prison officials: The Eighth Amendment requires them to reasonably protect inmates from exposure to serious diseases."), *petition for cert. filed*, (U.S. Jan. 4, 2024).

Although *Helling* dealt specifically with prison officials' deliberate indifference to the health risks posed by an inmate's exposure to environmental tobacco smoke, *see Helling*, 509 U.S. at 27-37, *Helling* and cases including *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), and *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), clearly established the legal principle that, because prisoners have limited or no ability to protect themselves, prison officials have a duty to protect them from involuntary exposure to dangerous prison conditions. *See Brown v. Bargery*, 207 F.3d 863, 867-68 (6th Cir. 2000) ("[T]he Eighth Amendment prohibits prison officials from exhibiting deliberate indifference toward future health problems that an inmate may develop as a result of current prison conditions." (citing *Helling*, 509 U.S. at 35)). This duty certainly encompasses not exhibiting deliberate indifference to

safety risks to inmates presented by the COVID-19 pandemic. *See Helling*, 509 U.S. at 33.

For these reasons, we conclude that a reasonable prison official would have understood that she could not exhibit deliberate indifference to the risk to inmate safety presented by the COVID-19 pandemic. Moreover, a reasonable prison official would have understood that, by purposefully commingling infected prisoners with uninfected prisoners, as Gordon alleged here, she was violating the Eighth Amendment. Accordingly, we conclude that the district court erred in ruling that the defendants were entitled to qualified immunity at the pleading stage.

The defendants contend, however, that the only issue that Gordon has preserved for review is the district court's decision to grant them qualified immunity at the pleading stage and not the court's decision that the right at issue was not clearly established. The defendants are correct that an appellant can forfeit review of an issue by not discussing it in his opening brief. *See Scott v. First S. Nat'l Bank*, 936 F.3d 509, 522 (6th Cir. 2019). But taking into consideration Gordon's pro se status, we conclude that he has not forfeited this issue. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Small v. Brock*, 963 F.3d 539, 543 (6th Cir. 2020). In his brief, Gordon argues that both the magistrate judge and the district court erred in concluding that he failed to cite case law that clearly established that the defendants' response to the COVID-19 pandemic violated his constitutional rights. And in the district court, Gordon cited *Helling*'s statement that prison officials have a duty to protect inmates from communicable diseases.

Lastly, our holding that Gordon abandoned his First Amendment, disability-discrimination, and gross-negligence claims is the law of the case. *See Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425 (6th Cir. 2017). And no exceptional circumstances exist that would warrant revisiting this decision. *See id.*

For these reasons, we **VACATE** the district court's judgment and **REMAND** this case to the district court for further proceedings. We **DENY** Gordon's motion for appointment of counsel as moot.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-1775

FILED
Apr 24, 2024
KELLY L. STEPHENS, Clerk

JIMMIE LEON GORDON,

Plaintiff-Appellant,

v.

SHERRY L. BURT, sued in her individual capacity as an employee of the State of Michigan, et al.

Defendants-Appellees.

Before: SILER, MOORE, and WHITE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is VACATED and REMANDED.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens
Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JIMMIE LEON GORDON,

Plaintiff,

Case No. 1:21-cv-415

v.

HON. JANET T. NEFF

S. BURT, et al.,

Defendants.
_____/

OPINION AND ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Defendants filed a motion to dismiss based on qualified immunity. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R), recommending that the motion be granted and that the case be dismissed (ECF No. 55). The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation (ECF No. 58). In accordance with 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b)(3), the Court has performed de novo consideration of those portions of the Report and Recommendation to which objections have been made. The Court denies the objections and issues this Opinion and Order.

The Magistrate Judge recommends finding that Defendants are entitled to qualified immunity

because it was not clearly established that Defendants' COVID-19 response violated the Eighth Amendment.

It is clearly established that prison officials may not "be deliberately indifferent to the exposure of inmates to a serious, communicable disease" under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). However, the Supreme Court has instructed lower courts "not to define clearly established law at a high level of generality" but rather assess "whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna,* 577 U.S. 7, 12 (2015) (cleaned up). The question in this case is whether it was clearly established in the Summer of 2020 that Defendants' decisions (1) to place close-contact COVID-19 prisoners with other nonclose- contact prisoners in the same housing unit and (2) to house non-close-contact prisoners in a dormitory-style setting with less than six feet of social distancing between bunks and only floor fans for ventilation violated the Eighth Amendment.

Plaintiff argues that the law was clearly established. He first relies on the CDC's Interim Guidance. However, the CDC's Interim Guidance cannot not make the law clearly established. *See Mays v. Dart*, 947 F.3d 810, 823 (7th Cir. 2020) ("The CDC Guidelines—like other administrative guidance—do not themselves set a constitutional standard.").

Plaintiff next relies on the emergency orders of the Michigan governor. This argument was not raised before the Magistrate Judge and is therefore waived. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000); *Uduko v. Cozzens*, 975 F. Supp. 2d 750, 757

(E.D. Mich. 2013). In fact, Plaintiff argued in his underlying response brief that the emergency orders were illegal and the Michigan governor lacked the authority to issue the orders (ECF No. 49 at PageID.424-26). Even if Plaintiff did not waive this argument, the Court is not persuaded that the emergency executive orders issued pursuant to state law—which the Michigan Supreme Court subsequently held unconstitutional, *see In re Certified Questions From United States District Court for the Western District of Michigan, Southern Division*, 958 N.W.2d 1, 25 (Mich. 2020)—are sufficient to satisfy the clearly established prong of the qualified immunity test.

Plaintiff also cites several cases that he claims have similar fact patterns, but each case is distinguishable. To begin, none of the cases involved a novel disease like the COVID-19 virus. *See Helling v. McKinney*, 509 U.S. 25 (1993) (environmental tobacco smoke); *DeGidio v. Pung*, 704 F. Supp. 922 (D. Minn. 1989) (tuberculosis); *Keller v. Cnty. of Bucks*, No. 03-4017, 2005 WL 675831 (E.D. Pa. Mar. 22, 2005) (MRSA). As several district courts have recognized, the COVID- 19 virus is "unprecedented" and "official guidance on recommended safety measures is continuously changing." *Ryan v. Nagy*, No. 2:20-cv-11528, 2021 WL 6750962 at *9 (E.D. Mich. Oct. 25, 2021), *report and recommendation adopted in part*, 2022 WL 260812 (E.D. Mich. Jan. 26, 2022); *Tate v. Arkansas Dep't of Corrs.*, No. 4:20-CV-558, 2020 WL 7378805 at *11 (E.D. Ark. Nov. 9, 2020), *report and recommendation adopted,* 2020 WL 7367864 (E.D. Ark. Dec.15, 2020).

Furthermore, the facts of the cases cited by Plaintiff are materially different from the facts in Plaintiff's case. For example, in *Helling*, the plaintiff was assigned to a cell with another prisoner who smoked five packs a day. 509 U.S. at 28. However, as correctly pointed out by the Magistrate Judge in this case, Plaintiff does not allege that he was placed in a cell with a COVID-19 positive prisoner or even a close-contact prisoner (ECF No. 55 at PageID.558).

In sum, Plaintiff's argument fails to demonstrate any factual or legal error in the Magistrate Judge's analysis or conclusion. The Court agrees with the Magistrate Judge that Plaintiff has not shown that as of August 2020, it was clearly established that Defendants' COVID-19 response violated the Eighth Amendment (ECF No. 55 at PageID.557).[1]

Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. A Judgment will be entered consistent with this Opinion and Order. *See* FED. R. CIV. P. 58. Therefore:

IT IS HEREBY ORDERED that Plaintiff's Objections (ECF No. 58) are DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 55) is APPROVED and ADOPTED as the Opinion of the Court.

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[1] The Court notes that the Magistrate Judge's recommendation to grant qualified immunity is consistent with several other district court decisions. *See, e.g., Jones,* 2022 WL 4244298 at *5; *Ross v. Russell*, No. 7:20-cv-774, 2022 WL 767093, *14 (W.D. Va. Mar. 14, 2022).

IT IS FURTHER ORDERED that Defendants' motion to dismiss (ECF No. 38) is GRANTED.

IT IS FURTHER ORDERED that this Court does not certify that an appeal of this decision would not be taken in good faith.

Dated: June 9, 2023

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JIMMIE LEON GORDON,

Plaintiff,

Case No. 1:21-cv-415

v.

HON. JANET T. NEFF

S. BURT, et al.,

Defendants.
_____/

JUDGMENT

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that this case is DISMISSED.

Dated: June 9, 2023

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JIMMIE GORDON #527260,

Plaintiff,

Hon. Janet T. Neff

v.

Case No. 1:21-cv-415

SHERRY BURT, et al.,

Defendants.
_____/

REPORT AND RECOMMENDATION

Plaintiff Jimmie Gordon, a Michigan prisoner incarcerated with the Michigan Department of Corrections (MDOC) at the Muskegon Correctional Facility (MCF), has sued Defendants Sherry Burt and Darrell Steward pursuant to 42 U.S.C. § 1983, alleging that they violated his Eighth Amendment rights by failing to properly implement COVID-19 protocols. Presently before me is Defendants' Motion to Dismiss on the basis of qualified immunity. (ECF No. 38.) The motion is fully briefed and ready for decision.

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the motion be **GRANTED** and that the case be **dismissed**.

I. Background

Plaintiff filed his verified complaint in this action on May 18, 2021, against Defendants Sherry Burt and

Darrell Steward, the warden and deputy warden at MCF, respectively, at the time of the events at issue in this case. Plaintiff also sued E. Hardiman, the head librarian at MCF. Plaintiff alleged that Defendants Burt and Steward violated his Eighth Amendment rights by failing to properly implement COVID-19 protocols. He also alleged claims under the Americans with Disabilities Act and Rehabilitation Act, as well as a state-law gross negligence claim. As to Defendant Hardiman, Plaintiff alleged a First Amendment access-to-the-courts claim.

Regarding his Eighth Amendment claim, Plaintiff alleged that after Defendant Burt notified the MCF general population of the first positive COVID-19 case at the facility on July 27, 2020, Defendants Burt and Steward instructed Housing Unit 2 officers to arrange for the close-contact Unit 2 prisoners to be transferred to Unit 1, where Plaintiff was housed. (ECF No. 1 at PageID.3.) Plaintiff alleged that Defendants Burt and Steward failed to isolate the close-contact prisoners from the non-close-contact prisoners who already resided in Unit 1, and that the close-contact prisoners were allowed to access the restrooms, showers, TV-room, and day-room along with the other prisoners. Plaintiff also alleged that he was a Unit-1 porter, and neither he nor any of the other porters in Unit 1 were instructed to sanitize the areas occupied by the close-contact prisoners. (*Id.*)

Plaintiff further alleged that on or after August 2, 2020, after Plaintiff and other prisoners began to file grievances about the reckless handling of the close-contact prisoners, Defendants Burt and Steward directed that all of the original Unit-1 prisoners be

moved to the gymnasium, which had been converted into dormitory-style housing space. (*Id.*) Plaintiff alleged that the bunk beds were less than 6 feet apart and that two floor-model industrial fans provided the only source of ventilation. Plaintiff made a verbal complaint to Corrections Officers Jones and Posvistak, who told him that he could either house in the gymnasium or in segregation, and that they were just following orders. (*Id.*) Plaintiff began to experience COVID-19 symptoms several days later, and on August 5, 2020, was informed that he tested positive for COVID-19 and was to be moved to isolation housing. (*Id.* at PageID.4.)

On October 20, 2021, the Court entered an Opinion and Order following initial review of Plaintiff's complaint, dismissing all claims for failure to state a claim. (ECF Nos. 6 and 7.) Regarding the Eighth Amendment claim, the Court found that Plaintiff failed to allege facts showing that Defendants Burt and Steward knowingly exposed Plaintiff, or any other prisoner, to a COVID-19 positive prisoner. The Court further noted that Plaintiff's allegations did not indicate that the close-contact prisoners were housed in the same cells as COVID-19 negative prisoners or that they were allowed to be in the communal areas of the unit unmasked and to use those areas at the same time uninfected prisoners were present. (ECF No. 6 at PageID.29.) The Court further noted that the MDOC had taken significant measures to limit the threat posed by COVID-19 and that the mere fact that prisoners were housed in dormitory-style units was insufficient to establish deliberate indifference. (*Id.* at PageID.30–31.)

Plaintiff appealed the judgment to the Sixth Circuit, which held that, with the exception of his Eighth Amendment claim, Plaintiff had abandoned his claims on appeal by failing to address the basis for their dismissal. (ECF No. 18 at PageID.84–85.) Regarding the Eighth Amendment claim, the court found that placing prisoners in dormitory style quarters during the COVID-19 pandemic satisfied the objective prong of his claim. As for the subjective prong, it stated:

> As highlighted by Gordon, many public health organizations warned of the particular risk that COVID-19 presents to prisoners and hence the need to implement and maintain social distancing. The MDOC recognized as much in developing procedures to segregate COVID-positive and close-contact prisoners from other prisoners and to sanitize areas occupied by close-contact prisoners. Yet, according to Gordon, whose allegations we must accept as true, the defendants disregarded these procedures by purposefully housing him with close-contact prisoners, allowing close-contact prisoners to commingle freely with other prisoners, and not sanitizing areas occupied by close-contact prisoners. In view of these allegations, the district court erred in concluding that the MDOC's publication of COVID-mitigation procedures defeated Gordon's claim that the defendants subjectively disregarded the risk presented by COVID-19. *See Brooks v. Washington*, No. 21-2639, 2022 U.S. App. LEXIS 8451, at *5–7 (6th Cir. Mar. 30, 2022) (order). Moreover, like the district court in *Brooks*, the district court here erred in relying

> on *Wilson* and *Cameron* to conclude that the mere publishing of the mitigation procedures showed that the defendants were not deliberately indifferent to the risk presented to Gordon because both of those cases were decided on motions for preliminary injunctions after factual development of the record in the district courts. *See id.* at *7. "Thus, while [Gordon] may ultimately be unsuccessful in securing the relief he seeks, he has nevertheless put forth sufficient allegations that the defendants knew of and disregarded an excessive risk to inmate health or safety." *Id.* at *7–8.

(*Id.* at PageID.86–87.)

II. Motion Standard

A Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating its assertions in a light most favorable to Plaintiff to determine whether it states a valid claim for relief. *See In re NM Holdings Co., LLC*, 622 F.3d 613, 618 (6th Cir. 2010). Pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim must be dismissed for failure to state a claim on which relief may be granted unless the "[f]actual allegations [are] enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). As the Supreme Court has held, to 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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). This plausibility standard "is not

akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* If the complaint simply pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* As the Court further observed, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678-79.

III. Discussion

Defendants move for dismissal on the basis of qualified immunity. "Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Phillips v. Roane Cnty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once a defendant raises the qualified immunity defense, the burden shifts to the plaintiff to demonstrate that the defendant violated a right so clearly established "that every 'reasonable official would have understood that what he [was] doing violate[d] that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The analysis entails a two-step inquiry. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013). First, the court must "determine if the facts alleged make out a violation of a constitutional right." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Second, the court asks if the right at issue was "'clearly established' when the

event occurred such that a reasonable officer would have known that his conduct violated it." *Id.* (citing *Pearson*, 555 U.S. at 232). A court may address these steps in any order. *Id.* (citing *Pearson*, 555 U.S. at 236). A government official is entitled to qualified immunity if either step of the analysis is not satisfied. *See Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 440 (6th Cir. 2016).

The Sixth Circuit has already determined that Plaintiff adequately states an Eighth Amendment deliberate indifference claim based on Defendants' inadequate implementation of COVID-19 protocols. The law of the case doctrine applies in this situation. The doctrine provides that "a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). In order for the doctrine to apply, a court must have decided the issue explicitly or by necessary implication. *See Bowles v. Russell*, 432 F.3d 668, 676-77 (6th Cir. 2005). Because the Sixth Circuit explicitly decided whether Plaintiff states a claim for violation of a constitutional right, the doctrine applies in this case. *See Braden v. Corrs. Corp. of Am.*, No. 1:05-0052, 2009 WL 290460, at *2–3 (M.D. Tenn. Feb. 2, 2009) (concluding that the Sixth Circuit's prior decision that the plaintiff failed to state a claim of deliberate indifference to his serious medical needs constituted the law of the case). In this regard, Defendants' contention that "Plaintiff fails to satisfy either prong of the qualified immunity test" (ECF No. 39 at PageID.191), is incorrect. As the Sixth Circuit has observed, "asking whether there was a violation

of a constitutional right resembles the Rule 12(b)(6) question—has the plaintiff pleaded facts that state a claim for relief in the complaint?" *Crawford v. Tilley*, 15 F.4th 752, 764 (6th Cir. 2021). Here, the Sixth Circuit answered this question in the affirmative.

Only the second prong of the qualified immunity defense—whether Defendants' acts that allegedly violated Plaintiff's constitutional rights also violated clearly established law—remains open. The inquiry is thus whether qualified immunity is available at the motion-to-dismiss stage. The Sixth Circuit has observed that "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Wesley v. Campbell*, 779 F.3d 421, 433–44 (6th Cir. 2015); *see also Grose v. Caruso*, 284 F. App'x 279, 283 (6th Cir. 2008) ("Dismissals on the basis of qualified immunity are generally made pursuant Fed. R. Civ. P. 56 summary judgment motions, not 12(b)(6) sufficiency of pleadings motions."). On the other hand, it has recognized that when the "pleadings in th[e] case are not ambiguous" and "it is clear that no violation of a clearly established constitutional right could be found under any set of facts that could be proven consistent with the allegations or pleadings," a district court acts well within its discretion in granting a pre-answer motion to dismiss on the basis of qualified immunity. *Jackson v. Schultz*, 429 F.3d 586, 589–90 (6th Cir. 2005). More recently, the Sixth Circuit has explained that its statements cautioning against application of qualified immunity at the Rule 12(b)(6) stage "have more vitality in the clearly established context." *Crawford*, 15 F.4th at 765. But even this application is "nuanced," depending on whether the clearly established inquiry "turn[s]

on case-specific details that must be fleshed out in discovery." *Id.*

The clearly established prong focuses on the state of the law at the time the alleged violation occurred. As the Supreme Court has observed, "this Court's case law does not require a case directly on point for a right to be clearly established, [but] existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (internal quotation marks and original brackets omitted) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)). It is not enough to show that the right is established at "'a high level of generality.'" *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 992 (6th Cir. 2017) (quoting *Ashcroft*, 563 U.S. at 742). "[A] plaintiff must identify a case with a similar fact pattern that would have given 'fair and clear warning to officers' about what the law requires." *Id.* at 993 (quoting *White*, 137 S. Ct. at 552). Stated differently, "[o]n both the facts and the law, specificity is [a court's] guiding light." *Novak v. City of Parma*, 932 F.3d 421, 426 (6th Cir. 2019). "An official's conduct flunks this 'clearly established' test only if the conduct's unconstitutionality was 'beyond debate' when the official acted, such that any reasonable person would have known that it exceeded constitutional bounds." *DeCrane v. Eckart*, 12 F.4th 586, 599 (6th Cir. 2021). To determine whether a right is clearly established, a district court within the Sixth Circuit may consider binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point. *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010) (quoting *Risbridger v. Connelly*, 275 F.3 565, 569 (6th Cir. 2002)).

I conclude that in light of the circumstances surrounding COVID-19, a novel coronavirus, and the unique and unprecedented challenges prison officials faced in implementing COVID-19 precautionary measures, particularly in the early months of the pandemic (*see* ECF No. 39-5 at PageID.218 at PageID.218, Centers for Disease Control and Prevention Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (recognizing that constraints such as physical space, staffing, population, operations, and other resources and conditions may require adaptation of preventative measures)), this is an appropriate case to consider the clearly established prong at the motion to dismiss stage. *See Jones v. Burt*, No. 1:21-cv-41, 2022 WL 4244298, at *5–7 (W.D. Mich. July 15, 2022), *report and recommendation adopted in part and rejected in part*, 2022 WL 3210073 (W.D. Mich. Aug. 9, 2022) (granting motion to dismiss raising qualified immunity on claim that prison officials failed to allow social distancing in the dining hall because the plaintiff failed to show that "it was clearly established law and beyond debate that a prison employee violated the Eighth Amendment by seating two inmates at a four-person dining hall table, which resulted in less than six feet of social distancing between the two inmates"); *Brewer v. Dauphin Cnty. Prison*, No. 1:21-CV-1291, 2022 WL 16858014, at *9–10 (M.D. Pa. June 29, 2022), *report and recommendation adopted*, 2022 WL 16855566 (M.D. Pa. Nov. 10, 2022) (concluding in the alternative that the plaintiff failed to demonstrate a violation of a clearly established right because courts have declined to find a clearly established right in the context of COVID-19 in a prison setting "where prison administrators were, and still are, faced with a novel

virus, and those administrators took steps to mitigate the exposure to and spread of the virus"); *Ross v. Russell*, No. 7:20-cv-774, 2022 WL 767093, at *14 (W.D. Va. Mar. 14, 2022) (granting motion to dismiss based on qualified immunity on prisoner's claim that jail policies were inadequate to prevent the spread of COVID-19 because "it would not have been apparent to any of the defendants that their alleged conduct would violate [the plaintiff's] clearly established constitutional rights"); *Gasca v. Lucio*, No. 1:20-CV-160, 2021 WL 4198405, at *9 (S.D. Tex. May 24, 2021), *report and recommendation adopted*, 2021 WL 4192735 (S.D. Tex. Sep. 15, 2021) (concluding qualified immunity was appropriate on a motion to dismiss because the only pertinent authority "simply required officials to test and treat the inmates" and "[t]here was no caselaw requiring them to do more"); *Tate v. Arkansas Dep't of Corrs.*, No. 4:20-cv-558, 2020 WL 7378805, at *11 (E.D. Ark. Nov. 9, 2020), *report and recommendation adopted*, 2020 WL 7367864 (E.D. Ark. Dec. 15, 2020) (finding dismissal on qualified immunity grounds proper because "COVID-19 is, by definition, a 'novel' coronavirus" and reasonable officials would not have known that their COVID-19 response violated the plaintiff's clearly established constitutional rights").

In response to Defendants' motion, Plaintiff cites two cases, the Sixth Circuit's decision in the instant case and *Jones*, *supra*. (ECF No. 49 at PageID.428.) For obvious reasons, the Sixth Circuit's decision in this case in April 2022 cannot clearly establish the law as of August 2020. *See Cameron v. Grainger Cnty.*, 274 F. App'x 437, 439 (6th Cir. 2008) (noting that the law must be clearly established at the time of the alleged

violation). As for *Jones*, Plaintiff asserts that the district judge in that case held that Defendants Burt and Steward were not entitled to qualified immunity in connection with a COVID-19-based claim arising out of MCF. (ECF No. 49 at Pageid.432.) Plaintiff is partially correct, but his point is irrelevant. In *Jones*, Magistrate Judge Kent concluded that Defendants were entitled to qualified immunity because: (1) the plaintiff could not rely on the doctrine of *respondeat superior* to establish Defendants' liability for failing to isolate another prisoner who took a COVID-19 test that turned out positive; and (2) the plaintiff failed to cite any caselaw clearly establishing that a prison employee violated the Eighth Amendment by seating two inmates at a four-person dining hall table, resulting in less than six feet of social distancing. *Jones*, 2022 WL 4244298, at *6–7. In addressing the plaintiff's objections, Judge Maloney concluded that Defendants were not entitled to qualified immunity on the first claim because the plaintiff did not rely solely on *respondeat superior*, but he concluded that Defendants were entitled to qualified immunity on the table/social distancing allegation. 2022 WL 3210073, at *2. Here, Defendants do not seek qualified immunity on the basis that Plaintiff seeks to impose liability on the basis of *respondeat superior*. In short, these cases do not demonstrate that as of August 2020, it was clearly established that a defendant violates the Eighth Amendment by housing COVID-19 close-contact prisoners and non-close-contact prisoners in the same unit without isolation and failing to instruct porters to sanitize areas that were occupied by close-contact prisoners, nor do they clearly establish that a prison official's decision to house nonclose- contact prisoners in a dormitory-style setting with less than six feet of

social distancing between bunks and only floor fans for ventilation violates the Eighth Amendment.

Elsewhere in his brief, Plaintiff cites *Hutto v. Finney*, 437 U.S. 678 (1978), and *Helling v. McKinney*, 509 U.S. 25 (1993). (ECF No. 49 at PageID.426.) To the extent Plaintiff contends that these cases provided Defendants fair warning that their conduct was unlawful, his argument lacks merit. These cases do not place the present constitutional issue beyond debate because their facts were materially dissimilar to the present facts. The prisoners in *Hutto* were confined in punitive segregation for an indeterminate period of time, with "[a]n average of 4, and sometimes as many as 10 or 11, prisoners . . . crowded into windowless 8′x10′ cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell." *Id.* at 682. Some of the mattresses prisoners were given to use at night had been used by other prisoners with infectious diseases, such as hepatitis and venereal disease. Prisoners in isolation received fewer than 1,000 calories a day. *Id.* at 682–83. These facts do not clearly establish that Defendants' alleged deficient COVID-19 response violated the Eighth Amendment. In *Helling*, the plaintiff prisoner had been assigned to a cell with another prisoner who smoked five packs of cigarettes a day. *Id.* at 28. There is no allegation that Plaintiff was placed in a cell with a COVID-19 positive prisoner, or even a close-contact prisoner for that matter. *Helling* thus does not give clear guidance as to the lawfulness of the circumstances alleged in this action.

As stated in *Ryan v. Nagy*, No. 2:20-cv-11528, 2021 WL 6750962 (E.D. Mich. Oct. 25, 2021), *report*

and recommendation adopted in part, 2022 WL 260812 (E.D. Mich. Jan. 26, 2022):

> [A] reasonable official could not have known whether their COVID-19 response would have violated Plaintiff's Eighth Amendment rights. COVID-19 is unprecedented, and humanity's knowledge of the disease has evolved drastically over the course of the pandemic. *See* Tate, 2020 WL 7378805, at *11. Accordingly, official guidance on recommended safety measures is continuously changing. For example, masks, a now ubiquitous safety measure, were once believed to only be effective in certain medical settings. *See Fact check: Outdated video of Fauci saying "there's no reason to be walking around with a mask*", Reuters, October 8, 2020, https://www.reuters.com/article/uk-factcheck-fauci-outdated-video-masks/ fact-checkoutdated-video-of-fauci-saying-theres-no-reason-to-be-walking-aroundwith- a-mask-idUSKBN26T2TR. The world's understanding of COVID-19 in [sic] constantly evolving, and there is no precedent that would have made it clear to a reasonable official that the measures Defendants took unreasonably responded to the COVID-19 pandemic.

Id. at *9. In short, Plaintiff fails to cite any caselaw clearly establishing that Defendants' COVID- 19 response violated his Eighth Amendment rights.

III. Conclusion

For the foregoing reasons, I recommend that the Court **grant** Defendants' motion to dismiss on the basis of qualified immunity (ECF No. 38), and dismiss Plaintiff's remaining claims with prejudice.

Dated: May 3, 2023

/s/ Sally J. Berens
SALLY J. BERENS
U.S. Magistrate Judge

NOTICE

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within 14 days of the date of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

NOT RECOMMENDED FOR PUBLICATION

No. 21-1832

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 17, 2022
DEBORAH S. HUNT, Clerk

JIMMIE LEON GORDON,	)
	)
Plaintiff-Appellant,	)
	) ON APPEAL
	) FROM THE
	) UNITED STATES
	) DISTRICT COURT
v.	) FOR THE
	) WESTERN
SHERRY L. BURT, et al	) DISTRICT OF
	) MICHIGAN
Defendants-Appellees.	)

O R D E R

Before: SILER, MOORE, and WHITE, Circuit Judges.

Jimmie Leon Gordon, a pro se Michigan prisoner, appeals the district court's judgment sua sponte dismissing his federal civil rights complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A and 42 U.S.C. § 1997e for failure to state a claim for relief. 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).

Gordon is confined at Muskegon Correctional Facility (MCF). In May 2021, Gordon filed a 42 U.S.C. § 1983 civil rights complaint against Warden Sherry L. Burt and Deputy Warden Darrell M. Steward, claiming they violated the Eighth Amendment by displaying deliberate indifference to the risk presented to him by COVID-19. He also alleged that the prison law librarian, Elisia Hardiman, violated his First Amendment right of access to the courts and was guilty of disability discrimination. For purposes of this appeal, we assume that the following factual allegations from Gordon's complaint are true.

In March 2020, Michigan Governor Gretchen Whitmer issued an order to the Michigan Department of Corrections (MDOC) to implement COVID-19 mitigation protocols issued by various public health organizations, including the Centers for Disease Control (CDC). Among these safety measures was a recommendation to institute social distancing, i.e., keeping at least six feet from another person. Additional CDC bulletins warned of the heightened risk of COVID-19 transmission in prisons because of the communal living conditions for prisoners and their inability to maintain social distancing.

In July 2020, Warden Burt announced the first prisoner case of COVID-19 at MCF. Warden Burt and Deputy Warden Steward devised a plan to transfer

prisoners who had had "close contact"[1] with COVID-positive prisoners into Gordon's housing unit. These close-contact prisoners were permitted to commingle freely with non-close-contact prisoners in Gordon's unit, including Gordon. The corrections officers in charge of Gordon's unit failed to instruct the prisoners to sanitize areas occupied by close-contact prisoners.

Once prisoners began to file grievances about being housed with the close-contact prisoners, Warden Burt and Deputy Warden Steward decided to transfer the non-close-contact prisoners, including Gordon, to the prison's gymnasium for housing. However, the prisoners could not maintain social distancing in the gymnasium; moreover, ventilation was inadequate. Gordon complained to prison officials that the gymnasium did not comply with the CDC guidelines, but he was informed that his only other option was to be housed in segregation. R.1 (Compl. ¶¶ 233 24) (Page ID #3). Gordon contracted COVID-19 four to five days after being transferred to the gymnasium. He was then transferred to an isolation unit, where he recovered.

Gordon is functionally illiterate due to a mental disability. He therefore asked the librarian, Hardiman, to provide him with assistance under the prison legal-writer program in preparing and filing an

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[1] Under CDC guidelines, "close contact" means that a person was "less than 6 feet away from someone with confirmed or suspected COVID-19" for "a cumulative total of 15 minutes or more over a 24-hour period." Centers for Disease Control and Prevention, *How to Determine a Close Contact for COVID-19* (Feb. 4, 2022) (emphasis omitted) (available at How to Determine a Close Contact for COVID-19 | CDC (last visited June 13, 2022)).

institutional grievance so that he could exhaust his administrate remedies before filing a deliberate-indifference complaint in federal court. Hardiman refused his request. Gordon was able to prepare and file the necessary paperwork with the help of another prisoner, however.

In his verified § 1983 complaint, Gordon alleged that Warden Burt and Deputy Warden Steward were deliberately indifferent to the risk presented to him by COVID-19 by transferring the close-contact prisoners into his housing unit and then by quartering him in the gymnasium. Additionally, Gordon claimed that these actions amounted to gross negligence under Michigan law. Gordon also claimed that Hardiman violated his First Amendment right of access to the courts by denying his request for assistance under the legal-writer program. Further, Gordon alleged that Hardiman's refusal constituted disability discrimination under the Rehabilitation Act, 29 U.S.C. § 701, et seq., and the Americans with Disabilities Act, 42 U.S.C. § 12132, et seq. Gordon sued each of the defendants in his or her individual capacity only.

The district court granted Gordon leave to proceed in forma pauperis and then, upon initial screening of the complaint pursuant to §§ 1915(e)(2), 1915A, and 1997e, ruled that he had not stated a claim for relief.

First, the district court concluded that Gordon's deliberate-indifference claim failed as a matter of law because, although the COVID-19 pandemic presented an objectively serious threat to Gordon's health and safety, he failed to plead facts demonstrating that Warden Burt and Deputy Warden Steward acted in reckless disregard of that risk. In support of that

conclusion, the court observed that "Plaintiff does not allege facts showing that Defendants Burt and Steward knowingly exposed Plaintiff, or any other prisoner, to a COVID-19 positive prisoner." (R. 6, PageID 29). Additionally, the court reasoned that "[t]he mere fact that close-contact prisoners were housed in the same unit does not necessitate a finding that they were housed in the same cells as COVID-19 negative prisoners, or that they were allowed to be in the communal areas of the unit unmasked and to use those areas at the same time uninfected prisoners were present." (*Id.*). The district court also thought that it was consequential that Gordon failed to allege that he had any medical conditions that made him particularly vulnerable to COVID-19. Finally, in concluding that the defendants did not recklessly disregard the risk presented by COVID-19, the district court took judicial notice of procedures to mitigate transmission of the virus that the MDOC had published on its official website, including distributing masks to prisoners and isolating infected and close-contact prisoners from the general population. In view of these procedures, the court concluded that "the mere fact that prisoners were housed in dormitory style units is insufficient to establish deliberate indifference." (*Id.*, PageID 30-31).

Second, the district court concluded that Gordon's First Amendment claim against Hardiman failed because his right of access to the courts did not encompass the right to file institutional grievances. And the court concluded that Gordon failed to state a claim for disability discrimination because the federal discrimination statutes do not provide for liability against individuals.

The district court therefore dismissed Gordon's complaint. The court did not specifically address Gordon's state-law claim for gross negligence.

Gordon then filed a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), contending that the district court had made two errors in dismissing his deliberate-indifference claim. First, Gordon argued that the court improperly made credibility determinations and failed to accord his allegations the presumption of truth in finding that the defendants had not subjectively disregarded the risk presented to him by COVID-19. Second, Gordon argued that the district court erred in taking judicial notice of and crediting the mitigation procedures published on the MDOC's website. For instance, Gordon pointed out that, contrary to the regulations, the close-contact prisoners were not isolated from other prisoners (and indeed, they were purposefully housed in his unit) and the areas that they occupied were not properly sanitized. The district court summarily denied the motion, finding that Gordon had "merely reassert[ed] the facts set forth in his underlying complaint" and therefore that his "motion d[id] not provide any basis for reconsideration." (R. 9, PageID 53).

In his timely appeal, Gordon argues that the district court erred in concluding that he failed to state a deliberate-indifference claim and in denying his Rule 59(e) motion. Gordon does not address the district court's dismissal of his First Amendment, disability-discrimination, and state-law negligence claims. Consequently, Gordon has abandoned those claims on

appeal. *See Lyle v. Jackson*, 49 F. App'x 492, 493394 (6th Cir. 2002).

We review de novo a district court's decision to dismiss a complaint under §§ 1915(e), 1915A, and 1997e. *Grinter v. Knight*, 532 F.3d 567, 571-72 (6th Cir. 2008). The 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). We review the dismissal of claims at screening under the standard set out in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 608 (6th Cir. 2014); *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)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* To state a claim under § 1983, a plaintiff must allege that (1) a right secured by the Constitution or a federal statute has been violated and (2) the violation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). As a pro se litigant, Gordon is entitled to a liberal construction of his pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam).

A deliberate-indifference claim under the Eighth Amendment includes both an objective and a subjective prong: (1) the inmate "is incarcerated under conditions posing a substantial risk of serious harm" (the objective prong), and (2) "the official knows of and disregards an excessive risk to inmate health or safety" (the subjective prong). *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). In *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), we stated that "the objective prong is easily satisfied" in this context, *id.* at 840. "The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death." *Id.* "The transmissibility of the COVID-19 virus in conjunction with [a prison's] dormitory-style housing—which places inmates within feet of each other—and [an inmate's] health risks, presents a substantial risk that [an inmate] will be infected with COVID-19 and have serious health effects as a result, including, and up to, death." *Id.*

The subjective prong, on the other hand, generally requires alleging at least that the defendant "acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* (quoting *Farmer*, 511 U.S. at 842). "The official must have a subjective 'state of mind more blameworthy than negligence,' akin to criminal recklessness." *Cameron v. Bouchard*, 815 F. App'x 978, 984 (6th Cir. 2020) (quoting *Farmer*, 511 U.S. at 835). "The key inquiry is whether the [defendants] 'responded reasonably to the risk' . . . posed by COVID-19." *Wilson*, 961 F.3d at 840-41 (quoting *Farmer*, 511 U.S. at 844) (alterations added and omitted). And a response may be reasonable even if "the harm imposed by COVID-19 on inmates . . .

'ultimately [is] not averted.'" *Id.* at 841 (quoting *Farmer*, 511 U.S. at 844).

We conclude that Gordon sufficiently stated a deliberate-indifference claim against defendants Burt and Steward.

First, as just stated, housing prisoners in dormitory style quarters during the COVID-19 pandemic easily satisfies the objective prong.

Second, Gordon pleaded sufficient facts to satisfy the subjective prong. As highlighted by Gordon, many public health organizations warned of the particular risk that COVID-19 presents to prisoners and hence the need to implement and maintain social distancing. The MDOC recognized as much in developing procedures to segregate COVID-positive and close-contact prisoners from other prisoners and to sanitize areas occupied by close-contact prisoners. Yet, according to Gordon, whose allegations we must accept as true, the defendants disregarded these procedures by purposefully housing him with close-contact prisoners, allowing close-contact prisoners to commingle freely with other prisoners, and not sanitizing areas occupied by close-contact prisoners. In view of these allegations, the district court erred in concluding that the MDOC's publication of COVID-mitigation procedures defeated Gordon's claim that the defendants subjectively disregarded the risk presented by COVID-19. *See Brooks v. Washington*, No. 21-2639, 2022 U.S. App. LEXIS 8451, at *537 (6th Cir. Mar. 30, 2022) (order). Moreover, like the district court in *Brooks*, the district court here erred in relying on *Wilson* and *Cameron* to conclude that the mere publishing of the mitigation procedures showed that the defendants were not

deliberately indifferent to the risk presented to Gordon because both of those cases were decided on motions for preliminary injunctions after factual development of the record in the district courts. *See id.* at *7. "Thus, while [Gordon] may ultimately be unsuccessful in securing the relief he seeks, he has nevertheless put forth sufficient allegations that the defendants knew of and disregarded an excessive risk to inmate health or safety." *Id.* at *738.

For these reasons, we **VACATE** the district court's judgment dismissing Gordon's deliberate-indifference claim pursuant to § 1915(e)(2) and **REMAND** that claim to the district court for further proceedings. Having reached this conclusion, we do not need to address Gordon's argument that the district court erred in denying his Rule 59(e) motion. We **AFFIRM** the district court's judgment dismissing Gordon's other claims.

Siler, J., would affirm based on the decision by the district court.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JIMMIE LEON GORDON,

Plaintiff,

Case No. 1:21-cv-415

v.

Honorable Janet T. Neff

S. BURT et al.,

Defendants.
_____/

OPINION

This is a civil rights action brought by a state prisoner under 42 U.S.C. § 1983. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (PLRA), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. §§ 1915(e)(2), 1915A; 42 U.S.C. § 1997e(c). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, the Court will dismiss Plaintiff's complaint for failure to state a claim.

Discussion

I. Factual allegations

Plaintiff is presently incarcerated with the Michigan Department of Corrections (MDOC) at the Muskegon Correctional Facility (MCF) in Muskegon, Muskegon County, Michigan. The events about which he complains occurred at that facility. Plaintiff sues Warden S. Burt, Deputy Warden D. Steward, and Head Librarian E. Hardiman in their respective individual capacities.

Plaintiff alleges that on July 27, 2020, Defendant Burt notified the general population of the prison that the facility had encountered its first COVID-19 case. On July 31, 2020, Defendants Burt and Steward instructed Housing Unit 2 officers to arrange for the close-contact Unit 2 prisoners to be transferred to Plaintiff's housing unit, Housing Unit 1. Plaintiff states that Defendants Burt and Steward failed to effectively isolate the close-contacts from the non-close-contact prisoners who already resided in Unit 1. The close-contact prisoners were allowed to access the restrooms, showers, TV-room, and day-room along with the other prisoners.

During this time, Plaintiff was assigned as a Unit 1 porter. Plaintiff states that neither he nor any of the other porters in Unit 1 were ever instructed to sanitize the areas occupied by the close-contact prisoners. On August 2, 2020, Plaintiff and other prisoners began to orally grieve the reckless handling of close-contact prisoners. Consequently, Defendants Burt and Steward devised a plan to move all the original Unit 1 prisoners in the gymnasium, which had been converted

into a dormitory style housing space. Bunk beds in the unit were less than 6 feet apart and the only source of ventilation was two floor model industrial fans. Plaintiff made a verbal complaint regarding the lack of space to Unit 1 officers Jones and Posvistak, who told Plaintiff that he could house in the gymnasium or in segregation, and that they were just following orders. Approximately three to four days later, Plaintiff began to experience body pain, fatigue, and excessive sweating. On August 5, 2020, Plaintiff was informed that he had tested positive for COVID-19 and was to be moved to isolation housing.

Plaintiff states that he is thirty-eight years old and is functionally illiterate. Therefore, Plaintiff made a request to Defendant Hardiman for a legal writer to help him file an administrative grievance. Defendant Hardiman denied Plaintiff's request, but Plaintiff was able to find another prisoner who agreed to help him file a grievance, as well as the instant lawsuit.

Plaintiff claims that Defendants violated his Eighth Amendment rights, his First Amendment right to access the courts, and his rights under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, and Section 504 of the Rehabilitation Act of 1973 (RA), 29 U.S.C. § 794(a), because he was denied the benefit of the MDOC administrative grievance process because of his disability of functional illiteracy. Plaintiff seeks compensatory and punitive damages.

II. Failure to state a claim

A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a "'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

III. Eighth Amendment

Plaintiff's allegations do not rise to the level of an Eighth Amendment violation. The Eighth Amendment imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous," nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 345–46 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson*, 832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600–01 (6th Cir. 1998). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, "[n]ot every unpleasant experience a prisoner might endure while incarcerated constitutes cruel and

unusual punishment within the meaning of the Eighth Amendment." *Ivey*, 832 F.2d at 954.

In order for a prisoner to prevail on an Eighth Amendment claim, Plaintiff must show that he faced a sufficiently serious risk to his health or safety and that Defendants acted with "'deliberate indifference' to inmate health or safety." *Mingus v. Butler*, 591 F.3d 474, 479–80 (6th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (applying deliberate indifference standard to medical claims)); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (applying deliberate indifference standard to conditions of confinement claims).

In *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), the Sixth Circuit addressed, in the context of a class challenge under 28 U.S.C. § 2241, whether the petitioners could demonstrate a likelihood of success on their Eighth Amendment claim sufficient to support a preliminary injunction. The court found that the class of medically vulnerable inmates housed at the Bureau of Prisons (BOP) Elkton facility could not show a violation simply because they were housed in dormitory style units. The court reasoned that, while the risks of COVID-19 easily satisfied the objective prong, the petitioners could not demonstrate that the BOP's response to the serious risks posed by COVID-19 met the subjective prong of the Eighth Amendment standard. *Id.* at 840. The court reasoned that the question on the subjective prong was whether the BOP "responded reasonably to the risk." *Id.* at 840–41. Detailing the measures employed by the BOP to reduce the risk of transmission, the court concluded that the BOP's efforts "demonstrate the opposite of a

disregard of a serious health risk." *Id.* at 841. The court noted that its decision was consistent with the findings of other circuits. *Id.* at 842 (citing *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020) (per curiam); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (per curiam); *Marlowe v. LeBlanc*, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam)).

Two days later, in *Cameron v. Bouchard*, 818 F. App'x 393, 395–96 (6th Cir. 2020), the Sixth Circuit granted the defendants' emergency motion to stay an injunction requiring the identification to the court of all medically vulnerable inmates at the Oakland County Jail, an injunction they earlier had upheld, on the strength of *Wilson v. Williams*. The Sixth Circuit subsequently vacated the preliminary injunction, stating that in light of the holding in *Wilson v. Williams*, the plaintiffs had failed to allege facts showing that jail officials acted with reckless disregard to the serious risk posed by COVID-19. *Cameron v. Bouchard*, 815 F. App'x 978 (6th Cir. 2020).

In this case, Plaintiff claims that Defendants Burt and Steward placed him at risk by moving prisoners who had been in close contact with infected prisoners into Unit 1, where Plaintiff resided, and allowing those prisoners to share communal areas with uninfected prisoners. In addition, Plaintiff claims that Defendants further violated his rights by placing him and other original Unit 1 prisoners in the gymnasium, which had been converted into a dormitory style housing space. However, Plaintiff does not allege facts showing that Defendants Burt and Steward knowingly exposed Plaintiff, or any other prisoner, to a COVID-19 positive prisoner. The mere fact that close-

contact prisoners were housed in the same unit does not necessitate a finding that they were housed in the same cells as COVID-19 negative prisoners, or that they were allowed to be in the communal areas of the unit unmasked and to use those areas at the same time uninfected prisoners were present. Nor does Plaintiff allege facts showing that he has underlying conditions that make him especially vulnerable to COVID-19.

While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555. The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The court need not accept "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

The Court notes that the MDOC has taken significant measures to limit the threat posed by COVID-19.[1] *See* MDOC, *MDOC Response and Information on*

[1] The Court takes judicial notice of these facts under Rule 201 of the Federal Rules of Evidence. The accuracy of the source regarding this specific information "cannot reasonably be questioned."

coronavirus (COVID- 19), https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronaviruscovid- 19-250f43144337 (last visited Oct. 8, 2021).[2] The Court notes that Michigan State Industries produced masks for all prisoners and correctional facility staff to wear that can be laundered and worn again, and that each employee and prisoner received three masks. *Id.* In addition, with regard to the quarantine and care of sick prisoners, the MDOC instituted the following:

> - Facility healthcare staff will meet with prisoners who have presented with symptoms of coronavirus. The MDOC does not make the diagnosis of the coronavirus. The department is following the Michigan

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Fed. R. Evid. 201(b)(2); *see also* Paul F. Rothstein, *Federal Rules of Evidence* 49 (3d ed. 2019) (citing *Matthews v. NFL Mgmt. Council*, 688 F.3d 1107 (9th Cir. 2012) (taking judicial notice of statistics on the NFL website that the plaintiff played 13 games in California over 19 years); *Victaulic Co. v. Tieman*, 499 F.3d 227, 236–37 (3d. Cir. 2007), as amended (Nov. 20, 2007) (finding error where a district court took judicial notice of facts stated in "a party's . . . marketing material" on an "unauthenticated" website because marketing materials often lack precise and candid information and the source was not authenticated)). Moreover, "[t]he court may take judicial notice at *any* stage of the proceeding." Fed. R. Evid. 201(d) (emphasis added). Thus, the Court may take judicial notice even at this early juncture because the Court is permitted to take judicial notice *sua sponte*, Fed. R. Evid. 201(c)(1), and "the fact is not subject to reasonable dispute," Fed. R. Evid. 201(b).

[2] Although the page is hosted on Medium.com, the MDOC specifically links to this page from their website as the location where they will provide updates and information. *See* https://www.michigan.gov/corrections/0,4551,7-119-9741_12798-521973--,00.html (last visited Oct. 14, 2021).

Department of Health and Human Services protocol.

- Prisoners who test positive for the virus are isolated from the general population and any prisoners or staff they have had close contact with are identified and notified of the need to quarantine.

- Prisoners who test positive may be transferred to the department's designated quarantine unit at Carson City Correctional Facility. This unit is completely separated from the main facility, has limited movement and access to the unit is limited. Only a small number of designated staff work in the unit in 12-hour shifts to limit the number of people entering. Those staff members report directly to the unit and do not enter the main correctional facility. Prisoners transferred to the unit also stay on the unit and do not enter any other areas of the prison.

- Prisoners who have been identified as having close contact with another prisoner who tests positive, but have not tested positive for the virus themselves, will be isolated from the general population at their facility for the 14-day quarantine period.

- Co-pays for prisoners who need to be tested for COVID-19 have been waived.

- Prisoners have been urged to notify healthcare if they are sick or experiencing

> symptoms of illness so they can be evaluated. Prisoners who require outside medical attention will be transported to an area hospital for treatment.
>
> - Prisoners are considered in step-down status when they no longer have symptoms, are no longer considered contagious and have been medically cleared by our chief medical officer.

Id.

As noted above, the mere fact that prisoners were housed in dormitory style units is insufficient to establish deliberate indifference. Because none of the facts alleged by Plaintiff show that the named Defendants were deliberately indifferent to the risk of Plaintiff contracting COVID-19, his claim is properly dismissed.

IV. Access to the courts

Plaintiff claims that Defendant Hardiman violated his right of access to the courts when he denied Plaintiff's request for a legal writer to assist him in filing an administrative grievance. Defendant Hardiman's denial of a legal writer to assist Plaintiff in filing a grievance could not have barred Plaintiff from seeking a remedy for his grievance. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972). "A prisoner's constitutional right to assert grievances typically is not violated when prison officials prohibit only 'one of several ways in which inmates may voice their complaints to, and seek relief, from prison officials' while leaving a formal grievance procedure intact." *Griffin v. Berghuis*,

563 F. App'x 411, 415–16 (6th Cir. 2014) (citing *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 n.6 (1977)). Indeed, Plaintiff's ability to seek redress is underscored by his pro se invocation of the judicial process. *See Azeez v. DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982). Even if Plaintiff had been improperly prevented from filing a grievance, his right of access to the courts to petition for redress of his grievances (i.e., by filing a lawsuit) cannot be compromised by his inability to file institutional grievances, and he therefore cannot demonstrate the actual injury required for an access-to-the-courts claim. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (requiring actual injury); *Bounds v. Smith*, 430 U.S. 817, 821–24 (1977). The exhaustion requirement only mandates exhaustion of *available* administrative remedies. *See* 42 U.S.C. § 1997e(a). If Plaintiff were improperly denied access to the grievance process, the process would be rendered unavailable, and exhaustion would not be a prerequisite for initiation of a civil rights action. *See Ross v. Blake*, 136 S. Ct. 1850, 1858–59 (2016) (reiterating that, if the prisoner is barred from pursuing a remedy by policy or by the interference of officials, the grievance process is not available, and exhaustion is not required); *Kennedy v. Tallio,* 20 F. App'x 469, 470–71 (6th Cir. 2001). In light of the foregoing, the Court finds that Plaintiff fails to state a cognizable claim.

V. ADA and RA

Title II of the ADA provides, in pertinent part, that no qualified individual with a disability shall, because of that disability, "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Mingus v. Butler, 591 F.3d 474, 481–82 (6th Cir. 2010) (citing 42 U.S.C. § 12132).[3] In order to state a claim under Title II of the ADA, Plaintiff must show: (1) that he is a qualified individual with a disability; (2) that defendants are subject to the ADA; and (3) that he was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of plaintiff's disability. *See Tucker v. Tennessee*, 539 F.3d 526, 532-33 (6th Cir. 2008); *see also Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). The term "qualified individual with a disability" includes "an individual with a disability who, with or without . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

The Supreme Court has held that Title II of the ADA applies to state prisons and inmates. *Penn. Dep't*

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[3] Similarly, § 504 of the RA provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). "Because the ADA sets forth the same remedies, procedures, and rights as the Rehabilitation Act . . . claims brought under both statutes may be analyzed together." *Thompson v. Williamson Cnty.*, 219 F.3d 555, 557, n.3 (6th Cir. 2000) (citing *Maddox v. Univ. of Tenn.*, 62 F.3d 843, 846, n.2 (6th Cir. 1995)).

of Corr. v. Yeskey, 524 U.S. 206, 210–12 (1998) (noting that the phrase "services, programs, or activities" in § 12132 includes recreational, medical, educational, and vocational prison programs). The proper defendant under a Title II claim is the public entity or an official acting in his official capacity. *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir. 2002). Plaintiff expressly sues Defendants in their individual capacities only. Title II of the ADA does not provide for suit against a public official acting in his or her individual capacity. *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009). Therefore, Petitioner has failed to state a claim against these Defendants under the ADA or the RA. *Lee v. Michigan Parole Bd.*, 104 F. App'x 490, 493 (6th Cir. 2004) ("[N]either the ADA nor the RA impose liability on individuals."); *M.J. v. Akron City School Dist. Bd. of Ed.*, 1 F.4th 436 (6th Cir. 2021) ("Neither the ADA nor the Rehabilitation Act supports a claim against a public official acting in his or her individual capacity.").

Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiff's complaint will be dismissed for failure to state a claim, under 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and 42 U.S.C. § 1997e(c). The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). Although the Court concludes that Plaintiff's claims are properly dismissed, the Court does not conclude that any issue Plaintiff might raise on appeal would be frivolous. *Coppedge v. United*

States, 369 U.S. 438, 445 (1962). Accordingly, the Court does not certify that an appeal would not be taken in good faith. Should Plaintiff appeal this decision, the Court will assess the $505.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610–11, unless Plaintiff is barred from proceeding *in forma pauperis*, *e.g.*, by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $505.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

A judgment consistent with this opinion will be entered.

Dated: October 20, 2021

/s/ Janet T. Neff
Janet T. Neff
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JIMMIE LEON GORDON #

Plaintiffs,

v. Complaint

Case No. 1:21-cv-415
Janet T. Neff-U.S. District Judge
Sally J. Berens-Magistrate Judge

S. BURT,
sued in her individual capacity as an
employee of the State of Michigan,

D. STEWARD,
sued in his individual capacity as an
employee for the State of Michigan,

E. Hardiman
sued in her individual capacity as an
employee for the State of Michigan,

Defendants.
_____/

Jurisdiction & Venue

1.) This is a Civil Rights action filed by Mr. Jimmie Leon Gordon (Plaintiff) a State prisoner, for damages, under 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution and laws of the United States. The Court has jurisdiction under 28 U.S.C. Section 1334 and 1343(a)(3). The Plaintiff also alleges the tort of gross negligence. The Court has supplement jurisdiction over the Plaintiff's state law tort claims under 28 U.S.C. section 1367.

2.) The Western District of Michigan is an appropriate venue under 28 U.S.C. Section 1391(b)(2) because it is where the events giving rise to the claims herein.

3.) Plaintiff is a prisoner in the State of Michigan, in the custody of the Michigan Department of Corrections and was a prisoner at all times herein. Said prisoner is currently confined in Muskegon Correctional Facility, in Muskegon, Michigan.

DEFENDANT(S)

4.) Defendant S. BURT is, Superintendent/Warden, Defendant D. Steward, Deputy Warden, Defendant E. Hardiman, Head Librarian. All said Defendants hereinafter "Defendants"), at all times mentioned in this complaint, were assigned to the Muskegon Correctional Facility (MCF). Each Defendants is sued in their individual capacities. At all times mentioned in this complaint each Defendant acted under the color of state law.

PREVIOUS LAWSUITS

5.) A Complaint has not been filed by Plaintiff previously.

FACTS

EIGHTH AMENDMENT - *CRUEL AND UNUSUAL PUNISHMENT*.

6.) In the Spring of 2020, the Coronavirus (COVID-19) pandemic swept across the United States and the globe causing significant disruption to the living and working arrangements of virtually everyone including, State governments and it's Agencies i.e. Michigan Department of Corrections (MDOC);

7.) On March 23, 2020, the Governor of Michigan (Mrs. Gretchen Whitmer) issued Executive Order 2020-62 addressing the public health arising from the state of emergency mandating that MDOC implement institutional protocols consistent with guidelines set early on by Physicians, Public Health Officials, and the national Centers for Disease Control and Prevention (CDC)(issued March;

OBJECTIVE PRONG.

8.) Since *then, the States*, Counties and Localities have implemented a variety of measures to control the spead of the virus, with varying degrees of success. Absent a vaccine or *effective* treatment, the *only way* to slow and prevent spread of virus is through *social and physical distancing* which involves avoiding human contact, and staying at least six feet away from others. Even vigilant efforts to improve personal

hygiene are not enough to slow the spread of COVID-19; *World Health Organization, Coronavirus disease* 2019 (COVID-19) Situation Report-15 (March 11, 2020)(as of October 20, 2020);

9.) Dispite the efforts of many State agencies to control the transmission of COVID-19 in Michigan, on information and belief, as of the writing of this complaint, 800,000+ persons in the State has been infected as of May 8, 2021, and 18,000+ deaths resulted; and 3,514 new cases reported in State as of said date, inspite of vaccine;

10.) Prison and Jails has long been associated with inordinately high transmission probabilities for infectious diseases. The CDC's lengthy and detailed *"Interim Guidance on Management of Coronavirus Disease 2019* (COVID-19) *Correctional and Detention Facilities*" (March 23, 2020)(up dated Oct. 20, 2020) repeatedly emphasized the vital nature of social distancing for reducing transmission of the virus;

11.) Infections transmitted through droplets, like COVID-19, are particulary difficult to control in correctional facilities, as adequate physical distancing and decontamination of surfaces is usually impossible. Physicians and public health authorities regularly **warn** that prisons "are in no way equipped to deal with an out break once it gets in'. If an institution is already operating at far beyond its capacity, it is going to be very difficult to find areas where prisoners with suspected COVID-19 can be isolated." **Burki**, *Prisons are "in no way equipped" to deal with COVID-19* (May 2, 2020) 395 **The Lancet**, p. 1411;

12.) Said CDC guidance indicated that Prison and Jail populations are at *additional risk* due to a.) **double celling** b.) **the existence of dormitories** c.) **dining halls** d.) **reception centers** e.) *gymnasiums, and other* ***congregate spaces*** are accessible to most inmates; *See also, Perry v. Washington*, Case No. 1:20-cv-530, 2020 U.S. Dist LEXIS 113628, at *6 (W.D. Mich Feb. 12, 2021 (*unpublished*) (noting the measures that MDOC has taken to limit the threat of COVID-19 ... PRISONERS WHO HAVE BEEN IDENTIFIED AS HAVING **CLOSE CONTACT** WITH ANOTHER PRISONER WHO TESTED POSITIVE, BUT HAVE NOT TESTED POSITIVE FOR VIRUS THEMSELVES, WILL BE **ISOLATED** FROM THE GENERAL POPULATION AT THEIR FACILITY FOR THE 14-DAY QUARANTINE PERIOD);

SUBJECTIVE PRONG.

13.) On about July 27, 2020, Defendant Burt notified the Genernal Population (GP) via Memo/Internal Messaging system that "the facility had encountered it's first COVID-19 case;

14.) In response to said COVID-19 case, on about July 31, 2020, Defendant's Burt and Steward collectively devised a plan to start moving prisoner in which the infected individual, may have came into contact with, into Plaintiffs housing Unit (Unit-1). Upon information and belief, the infected *individual* and close-contact's were housed in Unit-2;

15.) On said date, Defendants Burt and Steward instructed Housing Unit 2 Officers to arrange for the close-contact Unit 2 prisoner's to be removed from

Unit 2, and placed into Plaintiffs housing Unit (Unit 1);

16.) Defendants Burt and Steward did not effectively *isolate* the close-contacts from the non-close-contact prisoner Unit-1 native's. Said close-contact prisoner's were authorized to utilize Restrooms, Showers, T.V.-Room and Day-room etc.) as the non-close-contact Unit-1 natives. Plaintiff was a assigned housing Unit-1 porter;

17.) Plaintiff, nor any of the other Unit-1 porters were instructed at anytime, by the Unit-1 housing Unit Officers to *sanitize* the areas that the close-contacts occupied. There was not any regulation enforcement given to Unit-1 housing unit Officers and personnel by Defendant's Burt or Steward;

19.) Upon information and belief, Plaintiff and Unit-1 native's, on about August 2, 2021, began to informally (orally) grieve the reckless handling of the close-contact prisoners housed in Unit-1, to Defendants Burt and Steward via Unit-1 Prison Counselor (PC), Wilson and Resident Unit Manager (RUM), West;

20.) In response to said Unit-1 native's informal grievance's relative to the close-contacts activities/movements within Unit-1, Defendants Burt and Steward devised a doubius plan to remove all Unit-1 native's from their established housing Unit (1), into the institutional *gymnasium*;

21.) Upon Plaintiff entering the gymnasium, Plaintiff observed that the Defendants converted the *the gymnasium into a dormitory-style, congregate space* for housing Plaintiff, with bunk-bed's positioned directly

next to one another, less than six-feet, "little or no ventilation", and the **only** source of ventilation being, two (2) floor model industrial fans blowing;

23.) As Plaintiff was moving his personal property into this congregate space, Plaintiff informally (orally) issued a grievance to the housing Unit 1 Officer's Jones and Posvistak stating," this housing arrangment the required six-feet distancing or proper ventilation per CDC guidelines;"

24.) "This living area put's me at 'high-risk' for getting the coronavirus." Said Officer's responded stating, "Prisoner *Gordon*, you can either be housed here (*gymnasium*) or in the hole (*segregation*), I am just following order's given to custody via MCF Administration (Defendants);

25.) Due to the *punative* conditions, and undue *isolation* of segregation, Plaintiff had no other choice but to move into the high-risk, congregate housing situation provided by the Defendants;

26.) After about three (3) to four (4) days in these housing conditions, Paintiff started experiencing symtoms associated with COVID-19 i.e. excessive sweating, undue fatigue, full-body pain etc.);

27.) On about August 4, 2020, Plaintiff was given a COVID-19 test via *Nasopharyneal* administered by MDOC Medical personnel. The following day on about August 5, 2020, Plaintiff was informed by MDOC Staff that Plaintiff had to be removed from (GP) and placed into the isolation housing Unit-2, as a result of a POSITIVE COVID-19 test;

ACCESS TO COURTS CLAIM.

28.) Plaintiff is a 38 year old who has a history if Special Education during his tender years in school. Since being incarcerated with the MDOC, Plaintiff has sat for the General Equivalency Exam (GED) multiple times and was met with failure. Plaintiff, upon information and belief, is 'functionally illiterate';

29.) Such *status* places Plaintiff outside the range of being capable of adaquately utilizing the resources in the institutional law library that would permit *reasonable* comprehension. For the reason indicated (insufficient intellectual or educational attainment), Plaintiff is/was unable to translate the facts herein, onto an administrative grievance (complaint) into an understandable presentation;

30.) Thereafter, on August 11, 2020, Plaintiff formally/informally requested from Defendant Hardiman assistance from the MCF Writ-Writer Program in said preparation and filing of the Admin. Grievance so that Plaintiff will be able to meet alt procedural prerequisites (exhaustion of State remedies) upon the filing of a nonfrivolous Bill under 42 U.S.C. § 1983;

31.) Defendant Hardiman 'denied' Plaintiffs' request for assistance in challenging the constitutionality of the conditions of his confinement as alleged herein, and as set forth in *Knop v. Johnson*, 977 F.2d 996, 1003 (1992 6th Cir.);

32.) Plaintiff *randomly* came across another inmate with intelligent, who can write coherent English and who have had some *modicum* of exposure to legal research and to the rudiments of prisoner-rights-law.

Plaintiff explained the facts to said inmate, and he provided adaquate assistance to Plaintiff in the preparation and filing of meaningful legal papers (Admin. Grievance & Bill for § 1983) to obtain "access" with getting the courthouse doors open in such a way that it will not automatically be slam shut on Plaintiff due to insufficient intellectual or educational abilities;

Exhaustion of Administrative Remedies

33.) All claim(s) herein have been Administratively Exhausted via Michigan Dep't. Of Corrections Grievance procdure;

34.) Plaintiff reallege and incorporate by reference paragraphs 1-34.

LEGAL CLAIMS

35.) Defendant's Burt and Steward action's in placing **close-contact** COVID-19 prisoners in Plaintiffs housing Unit without complete isolation from Plaintiff as a **negative** COVID-19 prisoner, until those **close-contacts** were medically cleared via a "**negative**" COVID-19 test as required by the CDC's *Interim Guidance on the Management of Coronavirus Disease 2019* (Covid-19) *Correctional and Detention Facilities* (March 23, 2020), constitute a violation of Plaintiffs rights secured by the **Eighth** (8th) **Amendment** to the United States Constitution.

36.) Defendants Burt and Stewards' action's in coverting the institutional gymnasium dep't into **dormitory style housing, congregate space, w/ poor ventilation**, and than placing Plaintiff within those conditions which is inimical to physical distancing

and mitigation of the spread of COVID-19 contrary to CDC Interim Guidelines for the Management of Coronavirus-Correctional and Detention Facilities constitute **deliberate indifference** to Plaintiff's health and safety in violation of Plaintiff's rights secured by the **Eighth** (8th) **Amendment** of the United States Constitution.

37.) The actions of Defendants Burt and Steward in placing close-contact COVID-19 prisoners in the same housing Unit as Plaintiff (non-close-contact) without complete isolation from Plaintiff until medically cleared via a "negative" COVID-19 test as required by CDC Interim Guidance on the Management of Coronavirus Disease 2019 (Covid-19) Correctional and Detention Facilities (March 23, 2020) constituted the tort of gross negligence under the law of Michigan (Mich. Comp. Law § 691.1407.

38.) Defendant Hardiman in failing to supply/provide Plaintiff (whose educational attainments is slight and intelligence is limited) with sufficient assistance in the preparation and filing the Bill for § 1983 herewith, formed a *barrier* to Plaintiffs right to effective and meaningful access to the court. Defendant Hardiman's actions constituted a violation of Plaintiffs rights under the First Amendment to the United States Constitution, causing Plaintiff injury to First Amendment rights.

39.) By failing to supply/provide Plaintiff, who is a 'functionally illiterate' inmate) with the benefits of the services, programs or activities in the form of sufficient assistance (Writ-Writer) in the preparation and filing of complaint herewith, due to a mental disability, constituted a violation of Plaintiffs rights under

the Americans w/ Disabilities Act 42 U.S.C.A. § 12132 et seq. and Rehabilatation Act of 1973, 29 U.S.C. § 701 et seq.

RELIEF REQUESTED

WHEREFORE, Plaintiff requests that the Court grant the following relief:

40.) Granting Plaintiff Compensatory damages against each Defendant, jointly and severalty.

41.) Plaintiff seek Punitive damages against each Defendant, jointly and severally.

42.) Plaintiff also seek a jury trial on all issues triable by jury,

43.) Plaintiff also seek recovery of their cost in this suit, and

44.) Any additional relief this court deem just, proper, and equitable.

Date: 5•13•21

Respectfully submitted,
Jimmie Gordon
Mr. Jimmie L. Gordon Inst. #527260
Muskegon Correctional Facility (MCF)
2400 S. Sheridan Drive
Muskegon, Michigan 49442

Verification

I have read the foregoing complaint and hereby verify that the matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Muskegon, Michigan on 5-13-21.

Jimmy Gordon
Mr. Jimmy L. Gordon #527260
Plaintiff