NOT RECOMMENDED FOR PUBLICATION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