APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 19-1558

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEANETTE D. DAVIS, Plaintiff-Appellant, v. RENEE THOMAS, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: MOORE, SUTTON, and NALBANDIAN, Circuit Judges.

Jeanette D. Davis, a Michigan prisoner proceeding pro se, appeals the district court's order granting the defendants' motion for summary judgment in her civil-rights case filed pursuant to 42 U.S.C. § 1983. 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).

On January 8, 2018, Davis filed a complaint against ten employees of the Michigan Department of Corrections ("MDOC") or the Women's Huron Valley Correctional Facility ("WHV"): correctional officer Renee Thomas, WHV Warden Millicent Warren, residential unit manager Alan Greason, Lieutenant Vincent Gauci, Sergeant C. White, nurse Katherine

Hammons,[1] MDOC Director Daniel Heyns, and grievance coordinators "Bragg" and "Boa." She alleged that, on December 3, 2013, Thomas used excessive force against her by spraying her in the face with pepper spray to stop an altercation that another prisoner had initiated. Davis alleged that Hammons was deliberately indifferent to a serious medical need when she refused to decontaminate Davis's eyes. According to Davis, she was diagnosed with glaucoma on July 3, 2017, and she contended that this was a result of Thomas spraying her eyes with a chemical agent. Davis further alleged that Thomas violated her Fourteenth Amendment right to due process by providing a false account of the altercation in a misconduct ticket and changing the time of the incident on the misconduct ticket. She asserted that, in a separate incident, Gauci sent her to administrative segregation in retaliation for filing a grievance. Finally, Davis alleged that Warren, Greason, Gauci, White, Heyns, Bragg, and Boa violated her First and Fourteenth Amendment rights by failing to resolve, process, or address her grievances properly. Davis sought a declaratory judgment and compensatory and punitive damages. She also moved for leave to proceed in forma pauperis.

The district court granted Davis leave to proceed in forma pauperis. On January 31, 2018, it dismissed her claims against Warren, Greason, White, Heyns, Bragg, and Boa under 28 U.S.C. §§ 1915(e)(2)(B), 1915A, and 42 U.S.C. § 1997e(c), for failure to state a claim upon which relief could be granted. It also dismissed Davis's claim that Thomas "'falsified documents' during the 'ticket writing process.'" The district court found that the defendants were entitled to Eleventh Amendment immunity to the extent that Davis sought declaratory relief and monetary damages against them in their official capacities. It allowed Davis's claims of cruel and unusual punishment, deliberate indifference, and retaliation to proceed against Thomas, Hammons, and Gauci in their individual capacities.

Thomas, Gauci, and Hammons eventually moved for summary judgment. A magistrate judge recommended granting the motions for summary judgment. Over Davis's objections, the

[1] Although Davis named "Hammon" as a defendant, both Hammons's motion for summary judgment and the magistrate judge's report and recommendation refer to her as "Hammons."

district court adopted the magistrate judge's report and recommendation, granted summary judgment in favor of the remaining defendants, and dismissed the case. Davis filed a timely motion for reconsideration, which the district court denied. Because Davis filed her motion for reconsideration within twenty-eight days of the district court's final judgment, that judgment is properly before us for review. *See* Fed. R. Civ. P. 59(e); *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 833 (6th Cir. 1999).

On appeal, Davis argues that the district court erred in granting the defendants' motions for summary judgment with respect to her excessive-force claim against Thomas, her deliberate-indifference claim against Hammons, and her retaliation claim against Gauci. She also argues that her complaint adequately stated deliberate-indifference claims against Warren, Greason, White, Heyns, Bragg, and Boa. Finally, Davis challenges the district court's findings that her claims against Thomas, Hammons, and Gauci were barred by the statute of limitations and that she failed to exhaust her administrative remedies with respect to these claims.

I. *Summary Judgment in Favor of Thomas, Hammons, and Gauci*

This court reviews de novo a district court's grant of summary judgment. *Latits v. Phillips*, 878 F.3d 541, 547 (6th Cir. 2017). "Summary judgment is appropriate if the materials in the record," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Id.*

Because § 1983 does not provide a statute of limitations, federal courts borrow the forum state's statute of limitations for personal-injury actions. *Bonner v. Perry*, 564 F.3d 424, 430 (6th Cir. 2009). In Michigan, that limitations period is three years. *See* Mich. Comp. Laws § 600.5805(2). Although state law governs the length of the statute of limitations, federal law governs the accrual date. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007). "[U]nder § 1983, the statute of limitations begins to run when the plaintiff knows or has reason to know of the injury that is the basis of the action." *Scott v. Ambani*, 577 F.3d 642, 646 (6th Cir. 2009). "A plaintiff has reason to know of h[er] injury when [s]he should have discovered it through the exercise of

reasonable diligence." *Id.* (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)); *see also Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001).

Davis alleged in her complaint that Thomas sprayed her with pepper spray on December 3, 2013, and that Hammons refused to treat her that same day, while her "eyes and face w[]ere burning." Because Davis would have been aware of her injury and Hammons's failure to treat her injury on December 3, 2013, the three-year statute of limitations for her excessive-force claim against Thomas and her deliberate-indifference claim against Hammons began to run on that date. *Scott*, 577 F.3d at 646. Davis did not file a grievance against Hammons, so the limitations period expired on December 3, 2016—three years later. Because Davis did not file her complaint until January 8, 2018, her deliberate-indifference claim against Hammons was barred by the statute of limitations. Alternatively, the district court properly dismissed Davis's claim against Hammons because Davis failed to exhaust her administrative remedies. *See* 42 U.S.C. § 1997e(a).

Davis did file a grievance against Thomas, which potentially tolled the limitations period for her excessive-force claim.[2] *Surles v. Andison*, 678 F.3d 452, 458 (6th Cir. 2012); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000). The tolling would have begun on December 10, 2013—seven days after the limitations period commenced—when Davis filed a Step I grievance. But Davis's Step III appeal was denied—and Davis's administrative remedies were exhausted—on August 25, 2014. The limitations period then expired on August 18, 2017, and Davis's complaint, filed on January 8, 2018, was untimely.

The district court also properly dismissed Davis's excessive-force claim against Thomas based on her failure to exhaust her administrative remedies properly. Under the Prison Litigation Reform Act, a prisoner may not bring suit under § 1983 until she has exhausted her administrative remedies. *Id.* This exhaustion requirement is not satisfied if a prisoner's grievance was denied as untimely. *See Woodford*, 548 U.S. at 83-84, 93; *Scott*, 577 F.3d at 647. Davis's grievance

[2] Davis's Step II grievance was untimely. Because an untimely grievance does not satisfy the Prison Litigation Reform Act's exhaustion requirement, *see Woodford v. Ngo*, 548 U.S. 81, 83-84, 93 (2006), it is at least questionable whether the grievance would toll the limitations period.

complaining of Thomas's excessive use of force was denied as untimely at Step II of the grievance process.

Finally, Davis alleged that Gauci placed her in administrative segregation in retaliation for filing a grievance. Davis filed a grievance on January 8, 2014, complaining that she was retaliated against when she was not released from administrative segregation on December 27, 2013. She alleged that, although she should have been released on that date, she was kept in administrative segregation until January 3, 2014. The grievance did not mention Gauci by name, but the magistrate judge presumed that this grievance was complaining of retaliation committed by Gauci. Even accepting the magistrate judge's assumption, the district court properly dismissed this claim for failure to exhaust, because the grievance complaining of retaliation was denied as untimely at Step II. *See Woodford*, 548 U.S. at 83-84, 93; *Scott*, 577 F.3d at 647.

II. Dismissal of Claims against Warren, Greason, White, Heyns, Bragg, and Boa

We review de novo a dismissal under §§ 1915(e), 1915A, and 1997e. *Flanory v. Bonn*, 604 F.3d 249, 252 (6th Cir. 2010). To survive dismissal under these statutes, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Hill v. Lappin*, 630 F.3d 468, 471 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court dismissed Davis's claims against Warren, Greason, White, Heyns, Bragg, and Boa because Davis "fail[ed] to allege facts demonstrating the personal involvement of those defendants in the claimed instances of unconstitutional conduct giving rise to the complaint."

Although Davis argues on appeal that the district court erred by dismissing her deliberate-indifference claims against Warren, Greason, White, Heyns, Bragg, and Boa, her complaint did not include any allegations from which to infer that these defendants were deliberately indifferent to a serious medical need. Rather, her claims against these defendants were based on their alleged failure to respond to or process her grievances properly. The district court properly dismissed Davis's claims against Warren and Heyns, because "[t]he 'denial of administrative grievances or the failure to act' by prison officials does not subject supervisors to liability under § 1983." *Grinter v. Knight*, 532 F.3d 567, 576 (6th Cir. 2008) (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)). Finally, although Davis alleged that Greason and White "had [the] opportunity" to

resolve grievances and that Bragg and Boa "interfer[ed] with processing and resolving Step[]I [and] II grievances," these allegations were too vague and conclusory to state a claim for relief. *See Iqbal*, 556 U.S. at 678.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jeanette Davis, #847988,

Plaintiff,

v.

Renee Thomas, et al.,

Defendants.

Case No. 18-cv-10075

Judith E. Levy
United States District Judge

Mag. Judge Stephanie Dawkins Davis

_____/

OPINION AND ORDER DISMISSING PLAINTIFF'S COMPLAINT IN PART AND DENYING PLAINTIFF'S MOTION TO APPOINT AN ATTORNEY

I. Introduction

This is a pro se civil rights case brought pursuant to 42 U.S.C. § 1983. Michigan prisoner Jeannette Dominique Davis, confined at the Huron Valley Women's Correctional Facility in Ypsilanti, Michigan, alleges that she was improperly sprayed with pepper spray following an altercation with another inmate, that she was denied proper medical care following the incident, that a corrections officer falsified documents during the disciplinary process, that prison officials failed to properly respond to her grievances, and that she was placed in administrative

segregation in retaliation for filing a grievance. She names Corrections Officer Renee Thomas, (former) Warden Millicent Warren, Residential Unit Manager Alan Greason, Lieutenant V. Gauci, Sergeant C. White, Nurse Hammon, (former) Michigan Department of Corrections Director Daniel Heyns, and Grievance Coordinators Bragg and Boa as the defendants in this action. She sues defendants in their individual and official capacities and seeks declaratory relief, monetary damages, and any other appropriate relief. The Court has granted plaintiff leave to proceed without prepayment of the fees and costs for this action. (Dkt. 5).

II. Discussion

Federal Rule of Civil Procedure 8(a) requires that a complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," as well as "a demand for the relief sought." Fed. R. Civ. P. 8(a)(2), (3). The purpose of this rule is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) and Fed. R. Civ. P. 8(a)(2)). While such notice pleading does not require detailed factual allegations,

it does require more than the bare assertion of legal conclusions. *Twombly*, 550 U.S. at 555. Rule 8 "demands more than an unadorned, the defendant-unlawfully-harmed me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Under the Prison Litigation Reform Act of 1996 ("PLRA"), the Court is required to sua sponte dismiss an in forma pauperis complaint before service on a defendant if it determines that the action is frivolous or malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 42 U.S.C. § 1997e(c); 28 U.S.C. § 1915(e)(2)(B); *see also* 28 U.S.C. § 1915A (applying this standard to government entities, officers, and employees as defendants). A complaint is frivolous "where it lacks an arguable basis either in law or in fact." *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325 (1989)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that (1) she was deprived of a right, privilege, or immunity secured by the federal Constitution or laws of the United States; and (2) the deprivation was caused by a person acting under color of state law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978); *Harris v. Circleville*, 583 F.3d 356, 364 (6th Cir. 2009). A pro se civil rights complaint is to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Despite this liberal pleading standard, the Court finds that portions of plaintiff's complaint are subject to summary dismissal.

The claims against defendants Warren, Greason, Gauci, White, Heyns, Bragg, and Boa must be dismissed. Plaintiff fails to allege facts demonstrating the personal involvement of those defendants in the claimed instances of unconstitutional conduct giving rise to the complaint. It is well-settled that a civil rights plaintiff must allege the personal involvement of a defendant to state a claim under 42 U.S.C. § 1983. *See Monell v. Department of Social Svs.*, 436 U.S. 658, 691-92 (1978) (Section 1983 liability cannot be based upon a theory of *respondeat superior* or vicarious liability); *Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009) (same); *see also Taylor v. Michigan Dep't of*

Corrections, 69 F.3d 716, 727-28 (6th Cir. 1995) (plaintiff must allege facts showing that the defendant participated, condoned, encouraged, or knowingly acquiesced in alleged misconduct to establish liability). Plaintiff has not done so with respect to defendants Warren, Greason, Gauci, White, Heyns, Bragg, and Boa. Conclusory allegations are insufficient to state a civil rights claim under § 1983. *Iqbal*, 556 U.S. at 678 (pleadings require "more than a sheer possibility defendant has acted unlawfully").

In addition, bare assertions that those defendants failed to supervise an employee, should be vicariously liable for an employee's conduct, erred in denying grievances or complaints, and/or did not sufficiently respond to the situation are insufficient to state a claim under § 1983. *See, e.g., Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (noting "that § 1983 liability must be based on more than respondeat superior, or the right to control employees" and absolving prison officials of liability where the plaintiff failed to show, beyond his pleadings, that the defendant officials did more than "the den[y] administrative grievances or [] fail[] to act"); *Martin v. Harvey*, 14 F. App'x 307, 309 (6th Cir. 2001) (dismissing a defendant because his "only

involvement was the denial of the appeal of the grievance," and, "[t]o the extent that defendant McGinnis is sued because of his past position of authority, the doctrine of respondeat superior does not apply in § 1983 lawsuits to impute liability onto supervisory personnel"). To state a claim for failure to supervise under § 1983, plaintiff must allege that "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006). Plaintiff makes no such allegation here.

Moreover, to the extent plaintiff asserts that one or more of the defendants violated her constitutional rights by denying her grievances, she fails to state a claim for relief. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. While a prisoner has a First Amendment right to file grievances against prison officials, *Herron v. Harrison*, 203 F.3d 410, 415 (6th Cir. 2000), the First Amendment does not impose an affirmative obligation on the government to consider,

respond to, or grant any relief on a petition for redress of grievances. *Smith v. Arkansas State Hwy. Employees, Local 1315*, 441 U.S. 463, 465 (1979) ("[T]he First Amendment does not impose any affirmative obligation on the government to listen [or] to respond . . ."); *Apple v. Glenn*, 183 F.3d 477, 479 (6th Cir. 1999) ("A citizen's right to petition the government does not guarantee a response to the petition or the right to compel government officials to act on or adopt a citizen's views."). Moreover, an inmate does not have a constitutionally protected interest in a jail or prison grievance procedure or the right to an effective procedure. *Walker v. Michigan Dep't of Corrections*, 128 F. App'x 441, 445 (6th Cir. 2005). To the extent that plaintiff is dissatisfied with the investigation of her concerns and responses to her grievance, she fails to state a claim upon which relief may be granted. *See Carlton v. Jondreau*, 76 F. App'x 642, 644 (6th Cir. 2003) ("Although a prisoner has a First Amendment right to file grievances against prison officials, a state has no federal due process obligation to follow all of its grievance procedures.") (internal citations removed).

Additionally, plaintiff also fails to state a claim upon which relief may be granted against defendant Thomas regarding the alleged

falsification of documents during the disciplinary process. "False accusations of misconduct filed against an inmate do not constitute a deprivation of constitutional rights where the charges are subsequently adjudicated in a fair hearing." *Cromer v. Dominguez*, 103 F. App'x 570, 573 (6th Cir. 2004) (citing *Cale v. Johnson*, 861 F.2d 943, 953 (6th Cir. 1988) (Nelson, J., concurring)). Though plaintiff alleges that defendant Thomas "falsified documents" during the "ticket writing process," there is no indication any defendant deprived her of due process in resolving the ticket. (Dkt. 1 at 7.) Instead, she was able to avail herself of the prison's full grievance procedure, and does not point to any facts demonstrating the grievance procedure was not a "fair hearing." *See Cromer*, 103 F. App'x at 573. Accordingly, plaintiff fails to state a claim as to this issue. *See id.*

Finally, plaintiff's claims for declaratory relief and monetary damages against all defendants in their official capacities are subject to dismissal on the basis of immunity. The Eleventh Amendment bars civil rights actions against a state, its agencies, and its departments unless the state has waived its immunity or Congress has abrogated it. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). "The

state of Michigan ... has not consented to being sued in civil rights actions in the federal courts," *Johnson v. Unknown Dellatifa*, 357 F.3d 539, 545 (6th Cir. 2004) (citing *Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986)), and Congress did not abrogate state sovereign immunity when it passed § 1983. *Chaz Const., LLC v. Codell*, 137 F. App'x 735, 743 (6th Cir. 2005). Eleventh Amendment immunity "bars all suits, whether for injunctive, declaratory, or monetary relief against the state and its departments . . ." *McCormick v. Miami Univ.*, 693 F.3d 654, 661 (6th Cir. 2012) (quoting *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 381 (6th Cir. 1993)). Eleventh Amendment immunity also prevents plaintiff from recovering money damages against prison officials sued in their official capacities. *Colvin v. Caruso*, 605 F.3d 282, 289 (6th Cir. 2010) (citing *Cady v. Arenac Co.*, 574 F.3d 334, 344 (6th Cir. 2009)). Accordingly, defendants are entitled to Eleventh Amendment immunity. *See Johnson*, 357 F.3d at 545. Plaintiff's claims for declaratory relief and monetary damages against defendants in their official capacities must be dismissed.

Having reviewed the complaint and applied the liberal pleading standard for pro se actions, the Court finds that the claims against

defendants Thomas, Hammon, and Gauzi in their individual capacities concerning the alleged instances of cruel and unusual punishment may proceed. *See Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (the Eighth Amendment protects prisoners from the use of excessive force and unwarranted physical assaults by prison officials); *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (same); *see also Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992). Plaintiff's claims against those defendants for lack of medical care and retaliation also survive. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (ruling that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (establishing a claim for retaliation where a state official takes action improperly based on constitutionally protected conduct); *Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999) (en banc) (applying constitutional retaliation claims to prisoners). On these issues, plaintiff has pleaded sufficient facts to state a claim for which relief may be granted. Service of those claims upon the remaining defendants is therefore appropriate.

III. Conclusion

For the reasons stated above, the Court concludes that plaintiff fails to state a claim upon which relief may be granted against defendants Warren, Greason, Gauci, White, Heyns, Bragg, and Boa. Accordingly, the Court **DISMISSES WITH PREJUDICE** the claims against those defendants. The Court also concludes that plaintiff fails to state a claim upon which relief may be granted against defendant Thomas regarding alleged falsified documents during the disciplinary process. Accordingly, the Court **DISMISSES WITH PREJUDICE** that claim against defendant Thomas.

The Court also concludes that all of the defendants are entitled to Eleventh Amendment immunity on plaintiff's claims for declaratory relief and monetary damages against them in their official capacities. Accordingly, the Court **DISMISSES WITH PREJUDICE** plaintiff's claims for declaratory relief and monetary damages against the defendants in their official capacities.

The Court further concludes that the cruel and unusual punishment, lack of medical care, and retaliation claims against defendants Thomas, Hammon, and Gauzi are not subject to summary

dismissal. Accordingly, the Court **DIRECTS** plaintiff to provide the Court with **3 copies** of the complaint within **30 days** of the filing date of this order so that service may be effectuated. The Court shall provide plaintiff with one copy of the complaint, which should be returned to the Court with the additional copies. Failure to comply with this order may result in dismissal of this action.

In addition, plaintiff's request for the appointment of a lawyer is denied at this time. 28 U.S.C. § 1915(e) permits the Court in a civil case proceeding without payment of fees to "request an attorney to represent any person unable to afford counsel" but does not require that an attorney be appointed. At this early stage of the case, plaintiff's request is denied. However, the Court will revisit this decision as the case develops.

An appeal from this order cannot be taken in good faith. *See* 28 U.S.C. § 1915(a)(3); *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

IT IS SO ORDERED.

Dated: January 31, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 31, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jeannette D. Davis,

Plaintiff,

v.

Rennee Thomas, Millicent Warren, Alan Greason, Vincent Gauci, C. White, Katherine Hammons, Daniel Heyns, Bragg, and Boa,

Defendants.

_____/

Case No. 18-cv-10075

Judith E. Levy
United States District Judge

Mag. Judge Stephanie Dawkins Davis

ORDER DENYING MOTION FOR RECONSIDERATION [33]

Plaintiff Jeannette D. Davis brought this action against defendants employed with the Michigan Department of Corrections ("MDOC"). On March 26, 2019, the Court adopted the magistrate judge's report and recommendation granting defendants' motions for summary judgment and dismissed the case. (Dkts. 31, 32.) Plaintiff now moves for reconsideration. (Dkt. 33.)

Motions for reconsideration should not be granted if they "merely present the same issues ruled upon by the court, either expressly or by

reasonable implication." E.D. Mich. LR 7.1(h)(3). Plaintiff's motion does not raise new issues and does not identify how the Court erred in its analysis for summary judgment. Plaintiff reiterates her arguments that she diligently pursued her administrative remedies and that MDOC made errors and caused delay during her administrative appeals process. None of her arguments are new, nor do they change the outcome of the Court's decision.

Accordingly, her motion for reconsideration (Dkt. 33) is **DENIED**.

IT IS SO ORDERED.

Dated: April 29, 2019.
Ann Arbor, Michigan

s/ Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on April 29, 2019.

s/Shawna Burns
SHAWNA BURNS
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jeannette D. Davis,

Plaintiff,

v.

Renee Thomas *et al.*,

Defendants.

Case No. 18-cv-10075

Judith E. Levy
United States District Judge

Mag. Judge Stephanie Dawkins Davis

_____/

JUDGMENT

For the reasons stated in the order entered on today's date, it is ordered and adjudged that the case is dismissed with prejudice.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/Shawna Burns
DEPUTY COURT CLERK

APPROVED:

s/Judith E. Levy
JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jeannette D. Davis,

Plaintiff,

v.

Renee Thomas, Millicent Warren, Alan Greason, Vincent Gauci, C. White, Katherine Hammons, Daniel Heyns, Bragg, and Boa,

Defendants.

_____/

Case No. 18-cv-10075

Judith E. Levy
United States District Judge

Mag. Judge Stephanie Dawkins Davis

ORDER ADOPTING REPORT AND RECOMMENDATION [28]

Before the Court is Magistrate Judge Stephanie Dawkins Davis's Report and Recommendation ("R&R") recommending that the Court grant defendants Renee Thomas and Vincent Gauci's, as well as defendant Katherine Hammons' motions for summary judgment (Dkts. 17, 23). The R&R recommends granting summary disposition in favor of defendants because plaintiff, Jeannette Davis' claims are untimely, and, even if timely, because she failed to properly exhaust her administrative remedies with the Michigan Department of Corrections ("MDOC").

Accordingly, Judge Davis did not reach plaintiff's claims on the merits. Plaintiff filed two objections to the R&R (Dkt. 29) and defendants responded (Dkt. 30). For reasons set forth below, both objections are overruled, and the R&R is adopted in full.

I. Background

Plaintiff brought this claim *pro se* under 42 U.S.C. § 1983 against various MDOC employees based on an incident that occurred while she was incarcerated. Her claims primarily revolve around the MDOC employees' response to an altercation, during which plaintiff's face was sprayed with some sort of chemical agent that allegedly caused plaintiff's diagnosis of glaucoma. After summary dismissal of some defendants (Dkt. 7), only claims against defendants Officer Renee Thomas, Lieutenant Vincent Gauci, and Katherine Hammons survived.

The Court has carefully reviewed the R&R and is satisfied that it is a thorough account of the relevant portions of the record. The Court incorporates the factual background from the R&R as if set forth herein.

II. Legal Standard

Parties are required to make specific objections to specific errors in a magistrate judge's report and recommendation rather than restate

arguments already presented to and considered by the magistrate judge. *Funderburg v. Comm'r of Soc. Sec.*, Case No. 15-cv-10068, 2016 U.S. Dist. LEXIS 36492, at *1 (E.D. Mich. Mar. 22, 2016); *see also Coleman-Bey v. Bouchard*, 287 F. App'x 420, 421–22 (6th Cir. 2008) ("Appellant's objections merely restate his First Amendment claim, which was rejected for the reasons stated in the magistrate judge's report and recommendation."). The Court reviews proper objections to the magistrate judge's recommended disposition de novo. Fed. R. Civ. P. 72.

III. Objection One

In her first objection, plaintiff improperly restates arguments that were before the Magistrate Judge. First, she reargues that she diligently pursued her administrative appeals. She also argues that Judge Davis failed to consider "documented clerical errors made by the defendant(s) . . . that delayed" her administrative appeals process (Dkt. 29 at 3), but she does not identify for the Court what these clerical errors were. Finally, she improperly argues the merits of her constitutional claim in her first objection. Because Judge Davis did not reach the merits of her

claim, there can be no error regarding an analysis of the merits. As such, this objection is improper.[1]

And in any event, Judge Davis was correct regarding plaintiff's contentions about pursuing the administrative process. The Supreme Court has held that *proper* exhaustion is required to exhaust administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 83, 90–91 (2006). This "'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Id.* at 90 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002) (emphasis in original)). The evidence before the Court, however, is that plaintiff failed to comply with administrative appeals procedures outlined by the MDOC such that it did not address plaintiff's claims on the merits. (*See* Dkt. 26-1 at 51.) Though plaintiff was pursuing her administrative remedies in some capacity, she did not do so in accordance with the necessary procedures.

[1] Plaintiff also points out a factual error. Judge Davis stated that plaintiff was diagnosed with glaucoma on July 3, 2017, but plaintiff states it was on August 22, 2017. Plaintiff has not identified—and the Court has not independently determined—how this potential factual error undermines the substantive conclusions of the R&R, so the Court need not address it.

Because the Court has not identified a proper basis for plaintiff's first objection, and Judge Davis' analysis on these issues was correct in the first instance, the objection is overruled.

IV. Objection Two

Plaintiff's second objection relates to the R&R's calculation of the tolling of the statute of limitations. Plaintiff argues that, rather than the tolling period for her claims concluding when the MDOC denied her Step III appeal, the statute of limitations should have continued to toll until the time she asserts that she actually became aware of the MDOC's Step III denial. The Court will liberally construe plaintiff's objection to argue that Judge Davis should have applied some sort of equitable tolling doctrine during the period after the initial issuance of the Step III denial in August of 2014 and the date plaintiff alleges she became aware of the denial—when she received a letter from the MDOC Office of Legal Affairs on May 17, 2015.

There is no support for the application of equitable tolling to exhaustion of remedies in the § 1983 prison litigation context. Moreover, even where equitable tolling principles apply in the Sixth Circuit, they are applied sparingly. Application of equitable tolling is appropriate

where a plaintiff may not have known the act giving rise to her injuries and requires the plaintiff to demonstrate that she "had been pursuing her rights diligently." *See Howard v. Rea*, 111 F. App'x 419, 421 (6th Cir. 2004).[2]

But assuming that equitable tolling were to apply here, it would still be inappropriate. First, plaintiff certainly knew of the acts giving rise to her injuries, as "evidenced by [her] filing of administrative grievances." *See id.* In addition, Judge Davis made an apt observation in the R&R regarding plaintiff's pursuit of these remedies, noting that plaintiff has "offer[ed] no explanation as to why she waited some 14 months after officials received her Step II grievances on March 11, 2014 and some 10 months after officials received her Step III grievance on July 2, 2014 to inquire about the Step III status." (Dkt. 28 at 12.) Plaintiff's failure to provide an explanation on this point persuades the Court that she has not diligently pursued her rights. The Court appreciates plaintiff's assertions that she was pursuing her administrative remedies

[2] In full, the doctrine requires a showing that "plaintiff lacked actual or constructive notice of the filing requirements, diligently pursued [her] rights, tolling would not prejudice the defendant, and the plaintiff was reasonably ignorant of the notice requirement." *Id.*

in a manner she believed appropriate under the circumstances. But for better or worse, the law requires more. She must pursue her claims diligently, and, in the manner prescribed by the MDOC, and because she did not, her second objection is overruled.

V. Conclusion

The Court agrees with the analysis and recommendation set forth in the R&R. Accordingly,

The Report and Recommendation (Dkt. 28) is **ADOPTED**;

Defendant Thomas and Gauci's motion for summary judgment (Dkt. 17) is **GRANTED;** and

Defendant Hammons' motion for summary judgment (Dkt. 23) is **GRANTED**.

IT IS SO ORDERED.

Dated: March 26, 2019
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on March 26, 2019.

s/Shawna Burns
SHAWNA BURNS
Case Manager

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JEANNETTE D. DAVIS,
Plaintiff,
v.
RENEE THOMAS, *et. al.*,
Defendants.
_____/

Case No.: 18-10075

Judith E. Levy
United States District Judge

Stephanie Dawkins Davis
United States Magistrate Judge

REPORT AND RECOMMENDATION
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Dkts. 17, 23)

I. PROCEDURAL HISTORY

Plaintiff brought this action *pro se* under 42 U.S.C. § 1983 on January 8, 2018. (Dkt. 1). On January 31, 2018, District Judge Judith E. Levy entered an opinion and order dismissing some of the defendants and some of Davis's claims. (Dkt. 7). Judge Levy later referred all pretrial matters in this case to the undersigned. (Dkt. 10). On August 27, 2018, defendants Thomas and Gauci filed a motion for summary judgment (Dkt. 17) to which Davis responded (Dkt. 20). Defendant Hammons filed her motion for summary judgment on December 18, 2018 (Dkt. 23), to which Davis responded (Dkt. 27). On December 28, 2018, defendants Thomas and Gauci filed a motion to amend their motion for summary judgment by submitting the exhibits to the Court since they inadvertently neglected to attach the exhibits to their dispositive motion. (Dkt. 25). The Court granted the

motion (*see* Text-Only order dated 01/04/2019) and the defendants filed the exhibits shortly thereafter. (Dkt. 26). In the order granting, the Court allowed Davis to submit a supplemental response to the motion for summary judgment in light of the newly-filed exhibits. However, to date, Davis has not filed a supplemental response.

The matter is now ready for report and recommendation. For the reasons set forth below, the undersigned **RECOMMENDS** that defendants Thomas and Guaci's motion for summary judgment (Dkt. 17) and defendant Hammons' motion for summary judgment (Dkt. 23) be **GRANTED** and that the case be **DISMISSED**.

II. FACTUAL BACKGROUND AND PARTIES' ARGUMENTS

Davis brought multiple constitutional claims against a number of Michigan Department of Corrections (MDOC) current and former employees. The district court, having reviewed Davis's complaint, dismissed some claims and some defendants. (Dkt. 7). What remains are Davis's claims of cruel and unusual punishment by the use of excessive force, lack of medical care, and retaliation against defendants Thomas, Hammons, and Gauci.

The factual background of the complaint is as follows. On December 3, 2013 Davis was involved in a physical altercation with prisoner Flournoy in the TV room. (Dkt. 1, Pg ID 6). Davis disengaged and stepped away from Flournoy

when other prisoners said the "officers" were coming. When defendant corrections officer Thomas came into the room Davis placed her hands in the air and asked Thomas not to shoot, stating that Flournoy had a hold of her legs. Thomas came closer to Davis and sprayed a chemical agent directly into her eyes after the altercation was over. On July 3, 2017, Davis was diagnosed with glaucoma, which she believes is the result of being sprayed with the chemical agent. (*Id.*).

Regarding her remaining claims against the remaining defendants, Davis says the following: Thomas inflicted cruel and unusual punishment on Davis when she sprayed her with a chemical agent although she posed no threat. The chemical agent caused permanent damage to her eyes. (Dkt. 1, Pg ID 7). Defendant nurse Hammons[1] violated the Eighth Amendment by inflicting cruel and unusual punishment when she did not treat Davis even though Davis asked for medical assistance. Instead, Hammons told Davis that there was nothing she could do and that the burning would go away. The allegation against defendant Gauci[2] is less clear. Davis states, in full, "Defendant V. Gauzi after filing a grievance of the excessive classificati [sic] to segregation in retaliation. Plaintiff again classified to ADM seg. without notice is due process violated [sic] after prisoner Flournoy was

[1] Davis names defendant "Hammon" in her complaint. However, defense counsel refers to this defendant as "Hammons." The undersigned will follow suit and refer to her as Hammons.

[2] This defendant's name is spelled differently throughout the record. Sometimes it is Gauci, and other times it is Gauzi. The undersigned will refer to this defendant as Gauci, as that is how her counsel refers to her.

released, causing 14th Amendment Equal Protection violation." The undersigned assumes that this is the retaliation claim that still remains against Gauci, as there is no other allegation against this defendant.

All three defendants raise the same arguments in their motions for summary judgment: (1) that Davis did not exhaust administrative remedies against them and (2) her claims are barred by the statute of limitations.

Specifically, they argue that Davis filed two grievances through step III of the grievance process that relate to the allegations in her complaint: WHV-2013-13-12-5223-28e ("5223") and WHV-2014-01-0149-05B ("0149"). However, because Davis did not timely file her Step II appeals, she has not exhausted her administrative remedies against the defendants. (Dkt. 17, at p. 10). Defendant Hammons argues that since Davis did not file a grievance naming her or addressing Davis's claims against her, Davis has not exhausted remedies on the claim. (Dkt. 23, at p. 10).

The defendants also argue that Davis's claims are barred by the three-year statute of limitations. They contend that Davis's claims against them arose from an incident that allegedly occurred on December 3, 2013. (Dkt. 23, at p. 11-12). They acknowledge that the statute of limitations was tolled for the period that Davis attempted to exhaust administrative remedies. However, Hammons argues that the tolling period does not apply to claims against her because Davis did not

raise a claim against her in a grievance. (Dkt. 23, at p. 12). Nevertheless, all three defendants argue that, even considering the tolling period, Davis's claims are time-barred because the applicable grievance reports were completed at Step III in August 2014—more than three years before she filed her complaint in January 2018. (Dkt. 17, at p. 11-12; Dkt. 23, at p. 13).

In her responses to the defendants' motions, which largely mirror each other, Davis contends that she completed the grievance process through all three steps. (Dkt. 20, at p. 3; Dkt. 27, at p. 3). She states that the three remaining defendants are either the subject of these grievances or have some supervisory capacity making them aware of the constitutional violations but still they refused to resolve the issues. (*Id.*). She argues that the statutory requirement that she exhaust administrative remedies does not impose a "name all defendants" requirement, and, therefore, she has exhausted administrative remedies in grievances 5223 and 0149.

Regarding the defendants' statute of limitations argument, Davis contends that her case is not time-barred. Davis says that, at the time she wrote a letter to the MDOC Office of Legal Affairs on May 17, 2015, she was unaware of a Step III response to her grievances. She appears to argue that since she did not become

aware that there was a Step III response until May 2015, her limitations period should not have resumed until then. (*Id.* at p. 4).[3]

III. ANALYSIS AND RECOMMENDATIONS

A. Summary Judgment Standard of Review[4]

When a party files a motion for summary judgment, it must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1). The standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *State Farm Fire & Cas. Co. v. McGowan*, 421 F.3d

---

[3] In response to Hammons' motion, Davis appears to contest defense counsel's request for concurrence on their motion for leave to amend the motion for summary judgment to file the exhibits with the court. (Dkt. 27, at p. 6). Her protestations are of no moment because the Court granted the motion and the defendants filed the exhibits with the Court.

[4] While some judges in this District have treated motions for summary judgment on the issue of failure to exhaust administrative remedies as unenumerated motions to dismiss under Rule 12(b)(6), *see e.g.*, *Neal v. Raddatz*, 2012 WL 488827 (E.D. Mich. Jan. 12, 2012), report and recommendation adopted in pertinent part, 2012 WL 488702 (E.D. Mich. Feb. 15, 2012), Judge Lawson has recently concluded that such a practice is not appropriate and legally unsupported. *See Anderson v. Jutzy*, 175 F.Supp.3d 781, 788 (E.D. Mich. 2016).

433, 436 (6th Cir. 2005) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). Furthermore, the evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Where the movant establishes the lack of a genuine issue of material fact, the burden of demonstrating the existence of such an issue shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). That is, the party opposing a motion for summary judgment must make an affirmative showing with proper evidence and must "designate specific facts in affidavits, depositions, or other factual material showing 'evidence on which the jury could reasonably find for the plaintiff.'" *Brown v. Scott*, 329 F.Supp.2d 905, 910 (6th Cir. 2004).
In order to fulfill this burden, the non-moving party need only demonstrate the minimal standard that a jury could ostensibly find in his favor. *Anderson*, 477 U.S. at 248; *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). However, mere allegations or denials in the non-movant's pleadings will not satisfy this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 251.

The Court's role is limited to determining whether there is a genuine dispute about a material fact, that is, if the evidence in the case "is such that a reasonable

jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Such a determination requires that the Court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Id.* at 254. Thus, if the plaintiff must ultimately prove its case at trial by a preponderance of the evidence, on a motion for summary judgment the Court must determine whether a jury could reasonably find that the plaintiff's factual contentions are true by a preponderance of the evidence. *See id.* at 252-53. Finally, if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 323. The Court must construe Rule 56 with due regard not only for the rights of those "asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," but also for the rights of those "opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

B. Statute of Limitations

Considering the defendants' arguments in reverse order, Davis's claims against the defendants are time-barred by the statute of limitations. As discussed more fully below, although the statute of limitations was tolled while Davis attempted to exhaust administrative remedies, she still filed her complaint some

four months after the statute of limitations on her claims had run. Therefore, her claims are barred by the statute of limitations.

There is no federal statute of limitations for § 1983 claims. Rather, "federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought." *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003) (citing *Wilson v. Garcia*, 471 U.S. 261, 275-76 (1985)). In Michigan, the three-year statute of limitations for personal injury claims outlined in Mich. Comp. Laws § 600.5805(1) governs section 1983 actions where the cause of action arises in Michigan. *Carroll v. Wilkerson*, 782 F.2d 44, 45 (6th Cir. 1986); *see also Chippewa Trading Co. v. Cox*, 365 F.3d 538, 543 (6th Cir. 2004) (noting that the three-year statute of limitations outlined in § 600.5805(1) is "borrowed for § 1983 claims."). However, the accrual of a section 1983 claim is a question of federal law, with reference to common law principles. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). In determining when the limitations period begins, courts must refer to federal law. *Roberson v. Tennessee,* 399 F.3d 792, 794 (6th Cir. 2005). The Sixth Circuit has held that, under federal law, the statute of limitations begins to run "'when the plaintiff knows or has reason to know of the injury which is the basis of [her] action. A plaintiff has reason to know of [her] injury when [she] should have discovered it through the exercise of reasonable diligence.'" *Id.* (quoting, *Sevier v. Turner,* 742 F.2d 262, 273 (6th

Cir.1984)). The statute of limitations applicable to a prisoner-initiated § 1983 suit is tolled while the plaintiff exhausts available state remedies. *Waters v. Evans,* 105 Fed. Appx. 827, 829 (6th Cir. 2004); *Brown v. Morgan,* 209 F.3d 595, 596 (6th Cir. 2000). This is because a prisoner cannot bring suit in federal court until the administrative remedies at the facility (the standard MDOC grievance procedure) are exhausted, thus making it unfair to count the time during the pendency of the administrative proceedings against the limitations period. *See Brown,* 209 F.3d at 596. Consequently, the statute of limitations begins to run once the plaintiff becomes aware of the injury, but it is paused while the prisoner seeks redress through administrative proceedings at the prison.

Defendants contend that Davis filed her complaint after the three-year statute of limitations expired on her claims relating to the incidents forming the basis of her complaint, even taking into account the tolling period for exhaustion of her administrative remedies. They contend that the applicable grievances were returned to Davis after her Step III appeal in August 2014, thereby starting the statute of limitations clock on her claims. (Dkt. 17, at p. 11-12). Yet, Davis did not file her complaint until January 8, 2018.

In the view of the undersigned, Davis's claims are barred by the statute of limitations. Davis's Eight Amendment claims concern Thomas's alleged use of excessive force by way of spraying a chemical agent in her face on December 3,

2013 to break up an altercation. (Dkt. 1). She filed the grievance related to this event with Thomas—grievance 5223—on December 3, 2013, thus beginning the tolling period that day. Her claim against Gauci concerns alleged retaliation for Davis's having filed a grievance apparently sometime in December 2013. (Dkt. 1). To the extent grievance 0149 implicates this retaliation claim, the grievance indicates that she was supposed to be released from segregation on December 27th but was not released until January 3, 2014. Davis filed her grievance on January 8, 2014, thereby beginning the tolling period that day. She did not file a grievance against Hammons. Both grievances proceeded through Step III. The responses to both grievances at Step III were mailed August 25, 2014. (Dkt. 26-1, Pg ID 333, 339). Thus, the tolling period ended on August 25, 2014 and plaintiff needed to file her complaint within three years of that date – i.e. in August 2017.[5] However, she did not file her complaint until January 8, 2018, over four months past the statute of limitations. Accordingly, the undersigned concludes that her claims are barred by the statute of limitations.

[5] Specifically, Davis needed to file her complaint on the excessive force claim by August 25, 2017. She became aware of the claim and began the grievance process on the same date, December 3, 2013. Thus, her limitations period did not begin to run until the grievance process was complete. Davis's retaliation claim needed to be filed in this Court by August 20, 2017. Davis was released from segregation on January 3, 2014 and began the grievance process on January 8, 2014. Thus, five days of her limitations period expired before the period was tolled when she began the administrative process.

Davis argues that the limitations period should have been tolled until she became aware of the Step III response. (Dkt. 20, at p. 4). According to Davis, she sent correspondence to the MDOC Office of Legal Affairs on May 17, 2015 and through this correspondence she learned of the Step III response. The Office responded to Davis's inquiry on June 23, 2015, indicating that unidentified grievances were processed and mailed to her on August 25, 2014, and that both were denied. (Dkt. 20, Pg ID 88). In view of Legal Affairs' responsiveness to her inquiry, it appears that through the exercise of reasonable diligence, she could have discovered this information much sooner than she did. Davis offers no explanation as to why she waited some 14 months after filing her Step II grievances on March 11, 2014 and some 10 months after officials received her Step III grievance on July 2, 2014 to inquire about the Step III status. In any event, her reasons are perhaps beside the point since she cites no authority for the proposition that the tolling period ends when she becomes aware that the grievance process is complete, rather than when the grievance process is actually completed. Furthermore, the undersigned is unaware of any authority suggesting that the limitations period does not start or resume to run against a prisoner until the prisoner is aware of a response to his or her Step III appeal. To the contrary, it appears that the grievance process is complete, and thus the tolling period typically ends, when the prison issues its Step III response. *See Jackson v. Saverhood*, 2013 WL 4507865, at *4

(E.D. Mich. Aug. 23, 2013) ("The Step III response ends the administrative process.") (citing MDOC Policy Directive 03.02.130); *Smith v. Doyle*, 2017 WL912115, at *2 (E.D. Mich. Feb. 6, 2017) (indicating that the grievance was completed, and the tolling period ended when MDOC issued its Step III response); *Johnson v. Freed*, 2010 WL 3907224, at *1 (E.D. Mich. Sept. 27, 2010) (Holding that prisoner's claim was not time barred where the complaint was filed within three years of the prison's Step III response); *Vartinelli v. Pramstaller*, 2010 WL 5330487, at *4 (E.D. Mich. Dec. 1, 2010), *report and recommendation adopted*, 2010 WL 5330484 (E.D. Mich. Dec. 21, 2010) ("The MDOC grievance process was completed with respect to that grievance on April 19, 2007, the date the Step III grievance response was approved" for purposes of the statute of limitations.).[6]

Accordingly, the tolling period ended when MDOC rendered its Step III response, on August 25, 2014. Therefore, Davis's complaint filed January 8, 2018,

[6] Some courts in the Western District accept the argument that the tolling period ends when the grievance process was required to be completed under MDOC policy. *See, e.g., Threatt v. Olger,* 2010 WL 1848515, *5 (W.D. Mich. May 7, 2010) (Bell, J.); *Brandon v. Bergh,* 2009 WL 4646954, *3 (W.D. Mich. Dec.8, 2009) (Edgar, J.). For example, if the policy stated that the grievance process shall be complete within 90 days of the prisoner's filing of the step I grievance, those courts would accept the 90-day period as the tolling period. These cases are unpublished and thus not binding. The undersigned sees no utility in following these cases. If the Court had, Davis's case would be even further beyond the limitations period as MDOC policy provides that the process shall be complete within 120 days of filling the Step I grievance, i.e. within 120 days of December 3, 2013 and January 8, 2014 respectively, or roughly April 3 and May 8, 2014. (*See* Dkt, 23, Exhibit C, Pg ID 197, P.D. 03.02.130, ¶ S).

was filed beyond the three-year statute of limitations, and is time barred. The complaint should be dismissed.

C. Exhaustion of Administrative Remedies

Even if the Court were to find that Davis's claims are somehow not barred by the statute of limitations, her claims still fail because she did not properly exhaust administrative remedies related to the claims in her complaint.

1. Legal Standard

Title 42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Section 1997e(a)'s "exhaustion requirement applies to all prisoners seeking redress for prison circumstances or occurrences." *Porter v. Nussle*, 534 U.S. 516, 520 (2002). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532. In *Jones v. Bock*, 549 U.S. 199, (2007), the Supreme Court held that failure to exhaust is an affirmative defense under the PLRA, and "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones*, 549 U.S. at 216. "Compliance with prison grievance procedures ... is all that is required by the

PLRA to 'properly exhaust.'" *Jones*, 549 U.S. at 218. "Congress has provided in §1997e(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). "[P]roper exhaustion of administrative remedies is necessary." *Woodford v. Ngo*, 548 U.S. 81, 84, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006).

In *Jones v. Bock*, the Supreme Court also held that the burden rests on the defendant to show that a plaintiff failed to exhaust when asserting exhaustion as an affirmative defense. *Jones*, 549 U.S. at 218. Accordingly, exhaustion is satisfied if plaintiff complied with the applicable MDOC grievance procedure and defendants bear the burden of showing otherwise. *Kramer v. Wilkinson*, 226 Fed. Appx. 461, 462 (6th Cir. 2007) (A prisoner-plaintiff "does not bear the burden of specially pleading and proving exhaustion; rather, this affirmative defense may serve as a basis for dismissal only if raised and proven by the defendants.").
A moving party with the burden of proof faces a "substantially higher hurdle." *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). "Where the moving party has the burden—the plaintiff on a claim for relief or the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). The Sixth Circuit has repeatedly

emphasized that the party with the burden of proof "must show the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Arnett*, 281 F.3d at 561.

Here, pursuant to MDOC policy directive 03.02.130 which is entitled "Prisoner/Parolee Grievances," there are four stages to the grievance process that must be followed before a prisoner can seek judicial intervention, each with specific time limits. (Policy Directive, Dkt. 23-4, Pg ID 194). First, the prisoner must attempt to resolve the issue with the staff member(s) involved within two business days of becoming aware of a grievable issue. (*Id.* at ¶ P). If the issue is not resolved, the prisoner may file a Step I grievance within five business days of the attempted resolution. (*Id.*). If the prisoner is not satisfied with the Step I outcome, he must request a Step II appeal form and then file the Step II appeal within 10 business days. (*Id.* at ¶ BB). If the inmate is still not satisfied with the result, he must then file a Step III appeal within 10 business days. (*Id.* at ¶FF). The Step III response ends the administrative process. A grievance may also be rejected for a number of enumerated reasons including if the grievance is untimely, but may not be rejected if there is a valid reason for the delay. (*Id.* at ¶ G(4)).

2. Analysis

In the view of the undersigned, grievances 5223 and 0149 do not exhaust administrative remedies because Davis did not timely appeal at Step II of the grievance process.

The defendants submitted all of the grievances Davis has filed while incarcerated and a report showing which grievances have been filed through Step III. These documents are accompanied by an affidavit from the MDOC Departmental Analyst who explained that the grievance report and grievance documents attached are a true and accurate copy of the grievances Davis filed. (Dkt. 26-1, Pg ID 286-87; 23-2, Pg ID 124-25). The grievances filed through Step III that relate to the complaint are grievances 5223 and 0149.

Davis filed grievance 5223 at Step I on December 3, 2013, the date of the macing incident. (Dkt. 26-1, Pg ID 336). In the grievance, Davis states that officer Thomas sprayed her even though she told her not to and even though she had her hands in the air. (*Id.*). The grievance was rejected because the subject was a misconduct issue. (*Id.* at Pg ID 335). Davis filed grievance 0149 at Step I on January 8, 2014. (*Id.* at Pg ID 342). In 0149, Davis alleges that she went to "seg" for a 15-day detention on December 3, 2013 because of a fight, and was scheduled to be released on December 27th. However, she did not get out on that date; instead, she was released on January 3, 2014. (*Id.*). The grievance was considered

on the merits but was rejected at Step I. According to the summary of the Step I response,[7] Davis served 15 days in "LOP" from December 12, 2013 to December 27, 2013 and was then classified to administrative segregation by the Security Classification Committee. (Dkt. 26-1, Pg ID 341). Davis appealed both grievances but apparently filled out her Step II appeal on grievance 5223 on the form for grievance 0149, and filled out her Step II appeal on grievance 0149 on the form for 5223. The prison acknowledged this mistake but still concluded that the appeals were untimely. According to the Step II appeal forms, the Step II appeals were due March 14, 2014. (*Id.* at Pg ID 334, 340). However, the grievance coordinator did not receive the appeals until June 9, 2014. (*Id.*).

Defendants are correct that an untimely grievance does not resolve administrative remedies. In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court held that "filing an untimely or otherwise procedurally defective administrative grievance" does not exhaust administrative remedies. *Id.* at 83, 90-91. The Court defined proper exhaustion as "using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits)." *Id.* at 90 (emphasis in original). The Court further stated, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively

[7] The copy of the Step I response is almost entirely unreadable. (Dkt. 26-1, Pg ID 343).

without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91.

The undersigned agrees with defendants that Davis's Step II appeals in both grievances were untimely. According to the Step II appeal forms, Davis's Step II appeal was due March 14, 2014, but was not received by the grievance coordinator's office until June 9, 2014. (Dkt. 26-1, Pg ID 334, 340). The appeals were rejected as untimely. (*Id.* at Pg ID 335, 341). In her Step III appeal in 5223, Davis appears to claim that her Step II appeal was timely based on a clerical error documented in an attachment, but there are no additional documents in her grievance report demonstrating a clerical error in this grievance. (*Id.* at Pg ID 340). She made a similar claim in her 0149 Step II appeal. (*Id.* at Pg ID 334). After review of the grievances, in particular the prison's response at Step III, it appears that the administrator considered the purported clerical error as well as the mix-up in the 0149 and 5223 forms; she concluded that plaintiff did not provide a valid reason for the delay. At Step III for both grievances, the grievance manager stated that Davis's Step II appeal was considered and "properly investigated," and that there was no additional information found that would provide a basis for overturning the Step II decision. (*Id.* at Pg ID 333, 339). For her part, Davis neither contested the timeliness of her Step II appeals in her response briefs nor did she come forward with any evidence to suggest that her Step II and III appeals

were improperly rejected or denied. Therefore, the undersigned concludes that the defendants have met their burden to show that Davis's Step II appeals did not comply with prison procedure (i.e. they were untimely), and that as a result, she failed to properly exhaust her administrative remedies against the defendants.

IV. RECOMMENDATION

For the reasons set forth above, the undersigned **RECOMMENDS** that defendants Thomas and Gauci's motion for summary judgment (Dkt. 17) and defendant Hammons' motion for summary judgment (Dkt. 23) be **GRANTED** and that the case be **DISMISSED**.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1981). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," "Objection No. 2," etc. Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed.R.Civ.P. 72(b)(2), Local Rule 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," etc. If the Court determines that any objections are without merit, it may rule without awaiting the response.

Date: February 20, 2019

s/Stephanie Dawkins Davis
Stephanie Dawkins Davis
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on February 20, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to all counsel of record and that I have mailed by United States Postal Service to the following non-ECF participant: Jeanette D Davis, #847988, Huron Valley Complex-Womens, 3201 Bemis Road, Ypsilanti, MI 48197.

s/Tammy Hallwood
Case Manager
(810) 341-7887
tammy_hallwood@mied.uscourts.gov

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Jeannette Davis, #847988,

Plaintiff,

v.

Renee Thomas, et al.,

Defendants.

Case No. 18-cv-10075

Judith E. Levy
United States District Judge

Mag. Judge Stephanie Dawkins Davis

_____/

ORDER DIRECTING SERVICE UPON DEFENDANTS THOMAS, HAMMON, AND GAUZI

This is a pro se civil rights case brought pursuant to 42 U.S.C. § 1983. Plaintiff filed an initial complaint, which the Court dismissed in part during the screening process. (Dkt. 5.) The Court directed Plaintiff to provide service copies of the complaint for the remaining defendants: former Corrections Officer Renee Thomas, Nurse Hammon, and Lieutenant V. Gauci. After plaintiff failed to provide the service copies within thirty days of the order allowing parts of her claim to go forward, the Court issued an order to show cause why she failed to provide the service copies. (Dkt. 8.) In response to that order, plaintiff explained that

she mistakenly had the service copies mailed to the wrong Eastern District of Michigan courthouse.

Having shown good cause and having provided the necessary service copies of the complaint, the United States Marshal is directed to serve a copy of the complaint and a copy of the Court's prior partial dismissal order upon defendants Thomas, Hammon, and Gauci without prepayment of costs.

IT IS SO ORDERED.

Dated: June 5, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on June 5, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager